Supreme Court, U.S.
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No.

IN THE

Supreme Court of the United States

THE STATE OF OKLAHOMA, ex rel., Moshe Tal, and Taxpayers Against Ripoffs ("T.A.R."), an association of more than ten resident taxpayers of the City of Oklahoma City, Oklahoma,

Petitioners,

v.

THE CITY OF OKLAHOMA CITY, OKLAHOMA, et al.,

Respondents.

On Petition For A Writ Of Certiorari To The Supreme Court of Oklahoma

PETITION FOR A WRIT OF CERTIORARI

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30 pp

QUESTION PRESENTED FOR REVIEW

Whether taxpayers' rights to due process are violated when the taxpayers' motion to intervene in a government action is denied on the grounds that the government is "adequately representing" the taxpayers' interests, and that holding of "adequate representation" is subsequently held to be res judicata so as to prevent the taxpayers from asserting a post-judgment challenge to the binding effect of the judgment against them, as authorized under *Hansberry v. Lee*, by showing that they were, in fact, inadequately represented.

PARTIES TO THE PROCEEDING

The following individuals and entities are parties to the proceeding in the court below:

Petitioners: **Moshe Tal, Ronald D. Benton, Lisa (Michelle) Bowers, Tracy (Joe) Ford** (a.k.a. "T.J."), **Robby (James) Lovett, W. D. McGowen, Dhybon McGowen, Dr. John Migliaccio, Steve Migliaccio, Physilla (Jo) Polley, Edna (Ennise) Richardson, Morning-Star Takapu, Kasey (Leigha) Toms**, and **Michael (Lawrence) Toms.**

Respondents: **The City of Oklahoma City** ("City"), Oklahoma, a municipal corporation; **Ronald J. Norick**, in his personal and official capacity as former Mayor of the City; **Kirk D. Humphreys**, in his personal and official capacity as the Mayor of the City; **James E. Thompson**, in his personal and official capacity as Assistant City Manager & former MAPS Director; **William O. West**, in his personal and official capacity as City's Municipal Counselor; **Daniel T. Brummitt** in his personal and official capacity as City's Assistant Municipal Counselor; **The Oklahoma City Urban Renewal Authority** ("Urban Renewal"), a public body corporate; **Tiana P. Douglas**, in her personal and official capacity as the Executive Director of Urban Renewal; **Stanton L. Young, Fred Jones Hall, J. Larry Nichols, Warren Gardner, and James R. Tolbert III**, in their personal and official capacities as Commissioners of the Urban Renewal; **William ("Bill") O. Johnstone** in his personal and official capacity as the former Commissioner of Urban Renewal; **Dan Batchelor**, in his personal and official capacity as legal counselor of Urban Renewal; **Bricktown Parking Investors, L.L.C.**, an Oklahoma Limited Liability Company; **Bricktown-TMK/Hogan Parking, L.L.C.**, an Oklahoma Limited Liability Company; **OKC Athletic Club Limited Partnership**, an Oklahoma Limited Partnership; **BAP-**

Bricktown, L.L.C., an Oklahoma Limited Liability Company; **TMK/Hogan**, a Joint Venture; **Bricktown TMK/Hogan Entertainment, L.L.C.**, an Oklahoma Limited Liability Company; **Hogan Property Management, L.L.C.**, an Oklahoma Limited Liability Company; **Torchmark Corporation** ("TMK"), an Alabama Corporation; **Torchmark Development Corporation** ("TDC") and **TMK Income Properties, L.P.** ("TIP") both subsidiaries of TMK; **Dan Randolph ("Randy") Hogan**; **Edwards Theatres Circuit, Inc.**, a California corporation; **Oklahoma Gas & Electric Company** ("OG&E"), an Oklahoma corporation; **The Benham Group**, an Oklahoma Corporation.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners, Moshe Tal, and Taxpayers Against Ripoffs, a group of ten or more taxpayers in Oklahoma City, Oklahoma, ("Taxpayers" "Petitioners") respectfully pray that a writ of certiorari be issued to review the judgment of the Supreme Court of Oklahoma in this case. The Oklahoma Supreme Court has upheld an extreme application of res judicata which directly violates the Petitioners' right to due process under the Fourteenth Amendment to the United States Constitution.

In plain contravention of the requirements of the Constitution of the United States and this Court's decision in *Hansberry v. Lee*, 311 U.S. 31 (1940), the Oklahoma Supreme Court has embarked on an exercise of judicial power which blocks taxpayers access to the courts and deprives them of their right to be heard. This judicial blockade not only denies taxpayers access to the courts in qui tam actions, it also has far reaching implications for denial of due process to any non-party class member in derivative or class actions.

Under the mandate of *Hansberry* a judgment in a class action or any other type of representative action is not res judicata as to those class members who have a conflict of interest with the class representative. *Richards v. Jefferson County Alabama*, 517 U.S. 793, 801 (1996). Where such conflict of interest exists, the representation is inadequate as a matter of law and it is a violation of due process to hold the judgment res judicata as to those non-parties. When a state's highest court rules in a manner which so deprives its citizens of due process this Court has declared that it is the duty of this Court to review the lower court's decision and correct the violations of due process. *Hansberry v. Lee*, 311 U.S. at 40. The traditional rule holds that an extreme application of state law res judicata violates the federal constitution. *Richards v. Jefferson County Alabama*, 517 U.S. at 804. As stated in *Hansberry*:

> The State courts are free to attach such

> descriptive labels to litigations before them as they may choose and to attribute to them such consequences as they think appropriate under state constitutions and laws, subject only to the requirements of the Constitution of the United States. But when the judgment of a state court, ascribing to the judgment of another court the binding force and effect of res judicata, is challenged for want of due process it becomes the duty of this Court to examine the course of procedure in both litigations to ascertain whether the litigant whose rights have thus been adjudicated has been afforded such notice and opportunity to be heard as are requisite to the due process which the Constitution prescribes.

Hansberry v. Lee, 311 U.S. at 40 (citing *Western Life Indemnity Co. v. Rupp*, 235 U.S. 261, 273 (1914)(emphasis added).

The lower court's decision involves an issue of the utmost federal importance. The decision below significantly weakens the protection of citizens' due process rights under the Fourteenth Amendment, as pronounced by this Court sixty years ago in *Hansberry v. Lee*. While this Court has heard and ruled upon other issues involving the extreme application of state res judicata, the question presented in this case has not been heard nor resolved. However, it is an issue that requires this Court's attention to inform taxpayers of the scope of their rights under *Hansberry*.

OPINIONS BELOW

The Opinion of the Oklahoma Supreme Court is reported at *State of Oklahoma ex rel. Tal v. City of Oklahoma City et al.*, 19 P.3d 268 (Okla. 2000) ("*Tal III*") Appendix pp. 1-13. The Oklahoma Supreme Court's order denying rehearing is not reported and is found in the Appendix at pp. 41-43. The Oklahoma County, Oklahoma, District Court order denying

intervention is not reported. The District Court order is included in the Appendix at pp. 39-40.

JURISDICTION

The Decision of the Supreme Court of Oklahoma was entered on September 26, 2000. *Tal III,* Appendix pp. 1-13. The Order denying the Taxpayers' Motion for Rehearing was entered on February 5, 2001. (Order, Appendix pp. 41-43). The decision in the State's highest court affirmed the dismissal of the Petitioners' action on the grounds that the res judicata effect of *City of Oklahoma City v. Oklahoma City Urban Renewal Authority,* 988 P.2d 901 (Okla. 1999)*("Tal I")* precluded them from establishing standing to bring the qui tam. *Tal III,* § 2, Appendix p. 7 and § 6, Appendix p. 9. The judgment below is therefore final for purposes of this Court's jurisdiction under 28 U.S.C. § 1257.

The petitioners expressly asserted below in their Brief in Opposition to Defendants' Motions to Dismiss[1] and on Appeal

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[1] The trial court found this action to be barred by res judicata and dismissed it based on the Motions to Dismiss filed by: **The City Defendants**: The City of Oklahoma City Ronald J. Norick, Kirk D. Humphreys, James E. Thompson; William O. West, Daniel T. Brummitt; **The Urban Renewal Defendants**: The Oklahoma City Urban Renewal Authority; Tiana P. Douglas, Stanton L. Young, Fred Jones Hall, J. Larry Nichols, Warren Gardner, and James R. Tolbert III, William ("Bill") O. Johnstone Dan Batchelor, and **The Hogan Defendants**: Bricktown Parking Investors, L.L.C.,; Bricktown-TMK/Hogan Parking, L.L.C.; OKC Athletic Club Limited Partnership, TMK/Hogan, Bricktown TMK/Hogan Entertainment, L.L.C., Hogan Property Management, L.L.C., and TMK Income Properties, L.P. Dan Randolph ("Randy") Hogan. At the request of the Taxpayers and through cooperation of all parties, the trial court Journal Entry dismissed the action as to all defendants based on the belief

to the Oklahoma Supreme Court, that the barring of this action on the grounds of res judicata was a violation of their right to due process under the 14th Amendment to the United States Constitution. Plaintiffs' Brief in Opposition to Defendants' Motions to Dismiss, Record Document No. ("R.Doc. No.") R. Doc. No. 9; Petition in Error filed in Appeal No. 92874, Exhibit C, Appendix pp. 51-52. Despite the issue having been raised, both the trial court and the Oklahoma Supreme Court failed to address the constitutional question. However, the lower court's failure to address the denial of due process does not present a barrier to this Court's review of the issue.

"The issue of whether a federal question was sufficiently and properly raised in the state courts is itself ultimately a federal question, as to which this Court is not bound by the decision of the state courts." *Street v. New York*, 394 U.S. 576, 583 (1969); *See also Black v. Cutter Labs.*,351 U.S. 292, 298 (1956) (this Court has a "duty to . . .determine for ourselves precisely the ground on which the judgment rests"). Accordingly, a state court cannot evade this Court's review by failing to discuss federal questions in its opinion. *Chapman v. Goodnow's Adm'r.*, 123 U.S. 540, 548 (1887) ("If a federal question is fairly presented by the record, and its decision is actually necessary to the determination of the case, a judgment which rejects a claim, but avoids all reference to it, is as much against the right . . . as if it has been specifically referred to and the right directly refused.").

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that because the City was a necessary party to a qui tam action, once the City was dismissed, the action had to be dismissed as to all remaining defendants.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution, XIV Amendment, Section 1, Due Process

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws. U.S.C.A. Const. Amend. XIV.

Federal Rule of Civil Procedure

Federal Rule of Civil Procedure 24. Appendix pp. 47-48.

Oklahoma Qui Tam Statutes

62 Okla.Stat. § 372. Appendix at pp. 44.

62 Okla.Stat. § 373. Appendix at p. 44-45.

Oklahoma Intervention Statute

12 Okla.Stat. § 2024(a)(2). Appendix at p. 45-46.

STATEMENT OF THE CASE

On March 15, 2000, the Taxpayers, ex rel the State of Oklahoma, filed a qui tam action against the City of Oklahoma City and twenty-nine other individual and corporate defendants. Petition, R. Doc. No. 1. Many of the defendants were either current or former officials or employees of the City of Oklahoma City. Other defendants were individuals and legal entities who were parties to or had knowledge of and benefitted from the contracts at issue which were entered into by the Oklahoma City Urban Renewal Authority acting as the

agent for the City of Oklahoma City. Petition, R. Doc. No. 1. The Taxpayers sought recovery of illegal transfers of public funds and property. *Id.*

The action was brought pursuant to the provisions of 62 Okla.Stat. § 373 which provides that following a written demand made pursuant to 62 Okla.Stat. § 372, a taxpayer may bring an action on behalf of the governmental entity after the proper governmental officers refused, failed or neglected to institute or diligently prosecute proper proceedings at law or in equity for the recovery of any money or property belonging to the state. 62 Okla.Stat. § 373. Petition, R. Doc. No. 1.

Prior to filing the qui tam petition the Taxpayers served the City with a written demand asking that the proper City official take the actions necessary to recover the public funds and property that had been transferred pursuant to the illegal contracts. Exhibit "A" to Plaintiffs' Brief in Opposition to Defendants' Motions to Dismiss, Rec. Doc. No. 9. The written demand contained approximately 60 allegations of wrongdoing.

Two weeks after the City received the written demand the City filed a declaratory judgment action against its agent, the Oklahoma City Renewal Authority and the other parties to the disputed contracts. Declaratory Judgment Petition, Exhibit "F" to Plaintiffs' Brief in Opposition to Defendants' Motions to Dismiss, Rec. Doc. No. 9. The petition asked that the Court judicially confirm the validity of the contracts, or in the alternative, declare the agreements invalid as a wrongful transfer of property rendering the contracts and transfers null and void and permitting the City to recover any and all property and other monies wrongfully transferred. Declaratory Judgment Petition, Exhibit "F" to Plaintiffs' Brief in Opposition to Defendants' Motions to Dismiss, Rec. Doc. No. 9.

Despite the written demand's 60 plus allegations of wrongdoing, including fraud and severe conflicts of interest involving the City and Urban Renewal Officials responsible for

making the contracts, the City brought the declaratory judgment to litigate only one claim, that the contracts and related transfers were given for inadequate consideration and provided constitutionally inadequate protections for the City. The City's Petition did not contain any mention of the claims relating to conflicts of interest, fraud or other allegations that would invalidate the contracts. Plaintiffs' Brief in Opposition to Defendants' Motions to Dismiss, R. Doc. No. 9, and Declaratory Judgment Petition attached thereto as Exhibit "F".

After receiving the written demand, the City never contacted the taxpayers about the allegations made in the written demand. The City did not perform any discovery or other investigation into the facts surrounding the allegations in the written demand. Plaintiffs' Brief in Opposition to Defendants' Motions to Dismiss, R. Doc. No. 9. The only discovery in the matter was performed by the "non-government" defendants. The non-government defendant's discovery consisted of taking the depositions of the Taxpayers. Except for the taxpayer group leader, Moshe Tal, the members of the taxpayer group had no personal knowledge of the facts and evidence supporting the allegations. All of the information the Taxpayers possessed in deciding to sign the written demand was given to them by Mr. Tal. Mr. Tal and his partner, Baltimore, Maryland Urban Redeveloper, David Cordish, had competed with the non-government defendants on the bids for the contracts with the City and Urban Renewal. While Mr. Tal and Mr. Cordish were not ultimately chosen, it was during the bidding and selection process that, as a first hand observer, Mr. Tal witnessed the facts and conduct underlying the allegations in the written demand. Plaintiffs' Brief in Opposition to Defendants' Motions to Dismiss, R. Doc. No. 9. The City's attorneys did not cross-examine any of the Taxpayers.

Mr. Tal's deposition was 129 pages long. During his deposition Mr. Tal was asked mostly about the claim of inadequate consideration. He was also asked a few, very limited questions about the allegations of fraud and illegal

conflicts of interest contained in the written demand. Plaintiffs' Brief in Opposition to Defendants' Motions to Dismiss, R. Doc. No. 9. While Mr. Tal was able to give some information about the conflicts and fraud, he explained that he did not have the materials that he needed to help him answer some of the questions. Mr. Tal also explained that some of the allegations were based upon a reasonable belief and, to avoid speculation, he would need to conduct further investigation before he would feel free to expound further on the allegations. Tal's 2/22/99 Deposition, pp. 81-82 , *Tal I*, Appeal No. 92874.

One week after taking Mr. Tal's deposition, the City tried the declaratory judgment in a Bench Trial. The City did not give the Taxpayers any notice, formal or informal of the trial date. Plaintiffs' Brief in Opposition to Defendants' Motions to Dismiss, R. Doc. No. 9. While the Taxpayers acknowledge that they were not legally entitled to notice, they had expected to be notified since they had received copies of the City's Petition and the defendants' answers. However, on Thursday, February 25, 1999, the Taxpayers' attorney discovered, through independent sources, that the trial was scheduled for Monday, March 1, 1999. Plaintiffs' Brief in Opposition to Defendants' Motions to Dismiss, R. Doc. No. 9.

On Monday, March 1, 1999, the Taxpayers' attorney appeared at the declaratory judgment trial and moved for intervention of right and, in the alternative, permissive intervention, based on the Taxpayers' belief that the City would not adequately represent their interests.[2] (Trial Transcript, p.

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[2] The Oklahoma Supreme Court mistakenly found that the Taxpayers' did not move for intervention of right. *See Tal I*, 988 P.2d at 905 § 15, Appendix pp. 26-27 ; District Court Order Denying Intervention of Right, Appendix pp. 39-40, Exhibit C, of Taxpayers' Petition in Error filed in the Oklahoma Supreme Court in *Tal I* showing the appeal of denial of intervention of right, Appendix pp. 55-56; Trial

31, Appendix p. 58; Motion to Intervene p. 1, Appendix p. 49). The trial court denied intervention on the grounds that the Taxpayers had not rebutted the presumption that the City was acting in good faith and would adequately represent the Taxpayers' interests. (Trial Transcript, p. 70, Appendix p. 58). Trial was thereafter held.

The City attorney charged with representing the City and the Taxpayers at trial was one of the attorneys who was intimately involved in the negotiations and drafting of the contracts the Taxpayers contended were illegal. Petition, R. Doc. No. 1. He made it clear in his opening statement, and throughout the trial, that he, the City, and the defendants all believed that the contracts were valid. Plaintiffs' Brief in Opposition to Defendants' Motions to Dismiss, R. Doc. No. 9 and Exhibit "L" attached thereto (excerpts from Declaratory Judgment Trial). The only "evidence" the City presented to "prove" the allegation that the contracts were invalid was the Taxpayers' depositions. The only witness the City called was the former MAPS Director/Manager (Assistant City Manager), who was also intimately involved in the negotiations and drafting of the contracts at issue. Plaintiffs' Brief in Opposition to Defendants' Motions to Dismiss, R. Doc. No. 9. He, of course, testified that he believed that the contracts were legal. The City did not cross-examine any of the defendants' witnesses, nor did the City present any evidence or testimony to rebut the evidence introduced by the defendants. Plaintiffs' Brief in Opposition to Defendants' Motions to Dismiss, R. Doc. No. 9.

At the close of the half day trial, the court held that the contracts were legal and supported by adequate consideration. Journal Entry of Judgment, Exhibit "A" to Taxpayers' Petition In Error, Appeal No. 92874.

The Taxpayers appealed the denial of intervention. The

Transcript p. 31, lines 18-36, Appendix p. 58.

Oklahoma Supreme Court affirmed the trial court's denial of intervention on the grounds that before a taxpayer can intervene in an action brought by the City on a written demand, the taxpayer must rebut the presumption that the City will act in good faith and adequately represent the taxpayers' interests. *Tal I,* 988 P.2d at 908 *§ 31*, Appendix p. 31.[3]

Following the decision in *Tal I*, the Taxpayers filed their qui tam petition in the case at bar (*"Tal III"*). Qui Tam Petition, R. Doc. No. 1. In their qui tam Petition, the Taxpayers brought all of the claims that were contained in the written demand, but were not litigated by the City in the declaratory judgment action. The Taxpayers further showed that because the City had, in fact, failed to adequately represent their interests, the judgment in the City's action in *Tal I* did not bar their bringing the qui tam after the City failed to diligently prosecute the action. Qui Tam Petition, R. Doc. No. 1.

The City, Urban Renewal and Hogan defendants filed Motions to Dismiss asserting that the judgment in *Tal I* was res judicata as to the Taxpayers and barred them from bringing the qui tam. R. Doc. No. 2–8 and 10-12. In their Brief in Opposition to the Defendants' Motions to Dismiss, the

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[3] The Oklahoma Supreme Court made a similar finding in *State ex rel. Tal v. Norick*, 991 P.2d 999 (Okla. 1999)(*"Tal II"*). In *Tal II*, the Taxpayers had served a written demand and filed a qui tam (before the City filed and action) based on an entirely different set of facts and against different parties than those involved in *Tal I* and *Tal III*. Subsequently, the City brought a declaratory judgment action on the *Tal II* written demand and the trial court dismissed the Taxpayers' qui tam as premature. The court also explained that the Taxpayers' could not bring a qui tam, while the City's declaratory judgment action was pending, absent a showing that the City was acting in bad faith and would not adequately represent the Taxpayers' interests.

Taxpayers contended that under *Hansberry v. Lee* the judgment in the City's action did not bar the Taxpayers' action because the City had a conflict of interest with the Taxpayers and, thus, did not adequately represent them at trial. Taxpayers argued that it would violate due process to hold that the judgment in the City's declaratory judgment bound the Taxpayers under such circumstances. Plaintiffs' Brief in Opposition to Defendants' Motions to Dismiss, R. Doc. No. 9. The Taxpayers' also stated that they did not believe that the finding of adequacy of representation used to deny intervention barred the Taxpayers' from asserting post-trial that the City had, in fact, failed to adequately represent the Taxpayers' interest. Plaintiffs' Brief in Opposition to Defendants' Motions to Dismiss, R. Doc. No. 9.

The district court disagreed with the Taxpayers and dismissed the action on the grounds that the judgment in the declaratory judgment action barred the Taxpayers from bringing a qui tam. Journal Entry, Appendix pp. 14-16. The Taxpayers appealed to the Oklahoma Supreme Court on accelerated appeal and the decision in that Court was based on the briefs filed in the District Court. R. Doc. No. 1-14.

The Oklahoma Supreme Court affirmed the district court's dismissal of the qui tam on two grounds: 1) The decision in *Tal I,* denying intervention on the grounds that the City was adequately representing the Taxpayers' interests, was res judicata and prevented the Taxpayers from raising the issue of adequate representation to contest the res judicata effect of the City's judgment. 2) The judgment in the City's declaratory judgment action was res judicata to all issues that were or could have been brought in the declaratory judgment. *Tal III,* Appendix pp. 1-13. The court also relied on the decision in *Tal II* (involving the unrelated contracts) finding that it was precedent to show that the Taxpayers' could not intervene in the City's action or bring a qui tam during the pendency of the City's action, unless the Taxpayers proved that the City was acting in bad faith and was failing to adequately represent their

interests.[4] *Id.*

The Taxpayers believe that the Oklahoma Supreme Court's decision denied their right of due process under the

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[4] The defendants filed Motions for Sanctions against the Taxpayers and their attorney under 12 Okla.Stat. § 2011 (the state version of Federal Rule of Civil Procedure 11). The defendants' alleged that sanctions were appropriate because the Taxpayers' action was barred by res judicata. They also alleged the action was filed for improper purposes. After hearing, the district court denied sanctions finding that the Taxpayers' action was objectively reasonable in light of the facts and law underlying Taxpayers' belief that the decision in *Tal I* was not res judicata to bringing the qui tam. The judge also denied Rule 2011 sanctions on the grounds of bad faith and improper purpose. The Hogan Defendants appealed that ruling which is currently pending in Oklahoma Supreme Court Appeal No. 95271. Then in the appeal of *Tal III*, The City, Urban Renewal and Hogan Defendants filed Motions for Appellate Attorney's Fees and Sanctions in the Oklahoma Supreme Court alleging the Taxpayers' appeal of the dismissal was frivolous. The motions for appellate sanctions were also denied. However, the same defendants had also filed motions for attorneys' fees in the trial court and the trial court granted those motions and ordered that the Taxpayers pay defendants' $185,000 in attorney fees. This award was based upon Oklahoma case law allowing an award of attorney's fees based on a subjective finding that an opposing party was acting in bad faith. The finding of bad faith was based upon the defendants' assertion that Mr. Tal had instigated the filing of the written demands in *Tal I* and *Tal II* and the Qui Tam Petition in *Tal III* as retaliation for the City not selecting him as the developer on the contracts being disputed in *Tal I* and *Tal III*. The Taxpayers have appealed the ruling which is currently pending in Oklahoma Supreme Court Appeal No. 95741.

Fourteenth Amendment of the United States Constitution and this Court's decision in *Hansberry v. Lee* and Taxpayers have thus petitioned this Honorable Court for Certiorari.

REASONS FOR GRANTING CERTIORARI

The state court's extreme application of res judicata has decided an important issue that directly impacts federal constitutional rights in a manner that conflicts with this Court's decisions in *Hansberry v. Lee* and progeny holding that res judicata arising out of a representative action cannot bind a non-party where the non-party's interests were not adequately represented.

The state court applied this unconstitutional example of res judicata under circumstances that have not been, but should be, settled by this Court.

The state court has held that when taxpayers seek to intervene in an action brought by a governmental entity, a decision denying intervention of right on the grounds that the taxpayers' rights are adequately represented, is res judicata and bars the taxpayer from making a post-trial *Hansberry v. Lee* challenge to the adequacy of representation for the purpose showing that the taxpayers had, in fact, been inadequately represented and they are not bound by the judgment. The right to make a post-trial showing of inadequate representation is expressly granted in *Hansberry v. Lee*. This Court held in *Hansberry*, if a member of a class in a representative action is able to prove post-trial that the class representative inadequately represented the class members' rights, that class member will not be bound by the judgment in the representative action.[5]

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[5] In *Richards v. Jefferson County, Alabama*, this Court held that in taxpayer actions based on public interests, ". . . we may assume that the States have wide latitude to establish procedures not only to limit the number of judicial

The law holding that a non-party will not be bound by a judgment in a representative action if the non-party's interests were not adequately represented is well settled under *Hansberry v. Lee.* Thus, the Taxpayers will not ask this Court to revisit that issue. However, there is no similar authority from this Court governing the issue of whether due process is violated where a non-party is held to be barred from making a *Hansberry v. Lee* challenge to a judgment when:

1) a non-party taxpayer seeks to intervene as a matter of right under FRCP 24(A), or similar state statute, in an action brought by a governmental entity, and,

2) intervention is denied based on the taxpayer's failure to rebut the presumption that the government is acting in good faith and will adequately represent the taxpayers interests, and

3) following judgment in the government's action, the decision denying intervention is held as res judicata against the

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proceedings that may be entertained but also to determine whether to accord a taxpayer any standing at all." *Richards,* 517 U.S. at 803. However, without this Court's further elucidation on the parameters of that statement, the Taxpayers believe that the unconstitutional limits imposed in this case are not within the scope of the rule or preclusion enunciated in *Richards.* The Oklahoma qui tam statutes have given the taxpayers standing to bring an action when the government refuses, neglects or fails to bring or diligently prosecute the claims contained in the taxpayers' written demand. 62 Okla.Stat. § 373. The phrase "diligently prosecute" shows the legislature's intent to allow a taxpayer action in situations where the government has already brought an action. With this grant of standing, both in the absence of the government bringing an action and when the government brings an action and fails in its duty, it is improper for a court to deny the taxpayers' right through the use of res judicata.

taxpayer on the question of adequate representation and the taxpayer is therefore barred from challenging the res judicata effect of the judgment as permitted under *Hansberry v. Lee*.

To properly understand the interconnection of rights and issues that call for this Court's decision to protect non-party due process rights, it is first necessary to have a general understanding of the law, rights and interests underlying qui tam suits, the rules and standards for intervention and the due process requirements of *Hansberry v. Lee*.

Purpose and Use of Qui Tam Laws

Qui tam laws are enacted to enable citizens to assist the government in discovering and prosecuting fraud against the government. In passing qui tam provisions, Congress intended to commission "private attorneys general" to assist the government in ferreting out fraud. Marc S. Raspanti and David M. Laigaie, Current Practice and Procedure under the Whistleblower Provisions of the Federal False Claims Act, 71 Temp. L. Rev. 23 (Spring 1998).

In Oklahoma, resident taxpayers of a city may, in the name of the State of Oklahoma as plaintiff, bring a qui tam action under 62 Okla.Stat. §§ 372, 373 to recover city money or property that was paid or transferred illegally or without authority. Before bringing a qui tam, the taxpayers must first serve a written demand upon the city asking that the appropriate officials institute proper proceedings to recover the money and property wrongfully transferred. If the city officials refuse, fail or neglect to institute or diligently prosecute proper proceedings at law or in equity to recover any money belonging to the city, then the taxpayers may bring a qui tam to enforce the city's right. *State ex rel. Trimble v. City of Moore*, 818 P.2d 889, 894 (Okla. 1991); *see also, Brown v. City of Warr Acres*, 946 P.2d 1140, 1149 (Okla. 1997).

The failure of a City solicitor to use reasonable diligence in prosecuting a suit instituted by the City upon the written demand of a taxpayer constitutes a failure to comply with the

written demand. *Id.*; *Williams v. Wilmington*, 171 N.E.2d 757, 762-63(Ohio 1960); 74 Am. Jur.2d Taxpayers' Actions § 31 (fn 80). Where a City shows its intent to dispute or contest the allegations made in the Taxpayers' written demand, it can be presumed that the City has refused to pursue the Taxpayers demand. *Taxpayers League of Wayne County v. Wightman*, 28 N.W. 2d 575 (Neb. 1947).

Due Process and Res Judicata

Res judicata, or claim preclusion, bars relitigation by the parties or their privies of issues which were or could have been litigated in an action which resulted in a final judgment on the merits. *Allen v. McCurry*, 101 S.Ct. 411, 415,(1980); *Temeron, Inc. v. Ferraro Energy Corp.*, 861 P.2d 319, 323 (Okla.App. Div. 3 1993) (*citing Erwin v. Frazier*, 786 P.2d 61, 64 (Okla.1989). When applying the doctrine of res judicata it is important to remember that in our system of law, there is a 'deep-rooted historic tradition that everyone should have his own day in court.' 18 C. Wright, A. Miller, & E. Cooper, Federal Practice and Procedure § 4449, p. 417 (1981); *Martin v. Wilks*, 490 U.S. 755, 761-762 (1989).

Generally, one is not bound by a judgment in litigation in which he is not designated as a party or to which he has not been made a party by service of process. *Hansberry v. Lee*, 311 U.S. at 40. "A judgment or decree among parties to a lawsuit resolves issues as among them, but it does not conclude the rights of strangers to those proceedings." *Martin v. Wilks, 490 U.S. 755, 762 (1989)*; *Blonder-Tongue Laboratories, Inc. v. University of Ill. Foundation*, 402 U.S. 313, 329 (1971).

In certain limited circumstances, when a person, who is not a party, has his interests adequately represented by someone with the same interests who is a party, the non-party may be bound by the judgment in that action. *See Hansberry v. Lee*, 311 U.S. at 41-42 (class or representative suits); 74 Am.Jur2d *Taxpayer Actions* § 62 (the rules governing res judicata in other representative actions applies equally to

actions instituted by or on behalf of taxpayers). The likelihood of a non-party being bound increases when the representative party is a governmental entity. 74 Am. Jur. 2d *Taxpayer Actions* § 62. In the absence of fraud or collusion, a judgment for or against a governmental body in an action brought by the governmental body on behalf of the public as a general rule is binding and conclusive on all residents, citizens, and taxpayers with respect to matters adjudicated which are of general and public interest. *Tacoma v. Taxpayers of Tacoma*, 357 U.S. 320 (1958).

However, in *Hansberry v. Lee* this Court held that it is a violation of due process to bind a non-party to a judgment in a representative action where the parties to the action did not adequately represent the non-party's interest. This Court further held that representation is inadequate as a matter of law where the putative representative has interests that conflict with the interests of the class. It is axiomatic that a representative plaintiff cannot maintain a class action when his interests are antagonistic to, or in conflict with, the interest of the persons he would seek to represent. *Albertson's, Inc. v. Amalgamated Sugar Co.*, 503 F.2d 459, 463 (10th Cir. 1974)(*citing, inter alia, Hansberry v. Lee*, 311 U.S. 32). The requirement of adequate representation must be stringently applied because members of the class will be bound by the decision of the court. *Id.*

A taxpayer's due process rights are also protected by the rule of *Hansberry v. Lee.* When the government brings an action on the written demand, the judgment in that action will not preclude a derivative action by the citizens, where there is evidence of a conflict between the self-interest of the government officials and the interest of the citizens. *Consumers Union v. Consumer Product Safety Comm'n*, 590 F.2d 1209, 1217-1218 (C.A. 1980) *reversed on other grounds*, 445 U.S. 375 (1980).

Intervention

The right to intervene is granted by statute which provides that upon timely application anyone shall be permitted to intervene in an action "[w]hen the applicant claims an interest relating to the property or transaction which is the subject of the action and he is so situated that the disposition of the action may as a practical matter impair or impede his ability to protect that interest." 12 Okla.Stat. § 2024 (a)(2); Fed.R.Civ.P. 24(a)(2).

Courts have held that under state statutes and rules similar to Federal Rule 24(a)(2), a taxpayer is entitled to intervene in an action brought by or against a public body or public officials on a matter affecting the rights of taxpayers generally, if it appears that the conduct of the case by the public body or public officials is inadequate to protect the taxpayers' rights. 74 Am. Jur.2d Taxpayers' Actions, § 47.

But ordinarily, a municipality or public body, through its officers, represents the taxpayers in litigation relating to municipal or public affairs, so that a taxpayer usually has no standing to seek intervention in such litigation in which the municipality is a party. The representation by the proper officers is presumed adequate to protect the interests of the citizens and taxpayers, in the absence of gross negligence, collusion, or bad faith on the part of such officers. *Pennsylvania v. Rizzo*, 530 F.2d 501, 505 (3rd Cir. 1976).

A Finding of Adequate Representation for Intervention is Not Constitutionally Sufficient to Protect a Party's Rights for Purposes of *Hansberry v. Lee*.

A finding of adequate representation for purposes of intervention does not comply with the due process requirements of *Hansberry v. Lee*. When adequacy of representation is considered for intervention, the court does not have to concern itself with whether the judgment will be binding on the failed intervener. Rather, when determining

the adequacy of representation for intervention, the court assumes that if intervention is denied, the intervener will not be bound by the judgment in the action if, in fact, the representation was inadequate. *Woolen v. Surtran Taxicabs*, 684 F.2d 324 (5th Cir. 1982); *Hobson v. Hansen*, 44 F.R.D. 18, 24, 26 (D.C.D.C. 1968)(holding that when a party is denied intervention of right, he will not be bound by the judgment if the representation is, in fact, inadequate).

The non-preclusive effect of a finding of "adequate representation" for purposes of intervention is discussed in the Advisory Committee's note to the 1966 amendment to Rule 24(a)(2). Prior to amendment, the language in Rule 24(a)(2) required that an applicant could not intervene of right, unless he showed that he was inadequately represented and that he would be "bound" by the judgment in which he sought to intervene. However, the two requirements created an oxymoron since, under *Hansberry v. Lee*, the failed intervener would not be bound by the judgment if, in fact, his rights were not adequately represented. The Committee, citing *Hansberry v. Lee*, 311 U.S. 32 found that a class member who was denied intervention and against whom a judgment in a class action is asserted as res judicata, would be entitled to show in a later action that he had not, in fact, been adequately represented and he was therefore, not bound. Advisory Committee Note, 1966 Amendment Fed.R.Civ.P. 24(a)(2).

The adequacy of representation for purposes of intervention does not preclude a claim of inadequate representation under *Hansberry* because "adequacy of representation" is different in the two situations. Adequate representation in the intervention context is not the constitutional equivalent of a finding of adequate representation for res judicata.

In *Woolen v. Surtran Taxicabs*, 684 F.2d 324, the Fifth Circuit held that the notion of adequate representation sufficient to satisfy the due process requirements for a class action is not the equivalent of adequate representation for

purposes of intervention of right. The court found that it was "apparent that the notion of adequacy for purposes of Rule 23(a)(4) (class certification) is one having more concern with the res judicata effects of a judgment on absent members of a class." *Woolen v. Surtran Taxicabs*, 684 F.2d at 332. The adequacy of representation in a class action is "that essential to due process under *Hansberry v. Lee* before absent class members can be bound." *Woolen v. Surtran Taxicabs*, 684 F.2d at 332. On the other hand, adequate representation for purposes of intervention of right is not concerned with res judicata or due process. *Woolen v. Surtran Taxicabs*, 684 F.2d 331, 332; *see also Llewellyn v. Beasley*, 415 N.E.2d 789, 793 (Ind.App. 1981)(holding that the interest necessary for intervention is not equivalent to the interest necessary for standing to bring an action).

An Analysis of the Right to Due Process and its Possible Violation by the Application of the Law Invoked in the Present Case Requires that This Court Grant Review of the Oklahoma Supreme Court's Decision

The Committee Notes and the Fifth Circuit in *Woolen* both recognize that a holding of adequate representation for intervention does not preclude a party from collaterally attacking the judgment when it is asserted as res judicata against him, where the party was, in fact, inadequately represented.

This result is justified because the standard for evaluating adequacy of representation for purposes of intervention is not equivalent to the standard of due process demanded by *Hansberry v. Lee*. In fact, the standards are even less alike in an action brought by the government, wherein a taxpayer seeks to intervene. When seeking to intervene in a government action, a taxpayer has to rebut the presumption of good faith and adequate representation. To prove inadequate

representation under *Hansberry v. Lee*, the taxpayer is not met with such a high burden. Rather, to avoid the res judicata effect of a judgment under *Hansberry* the non-party is merely required to show that there is a conflict of interest between the representative party and the non-party or show that he was actually, inadequately represented.

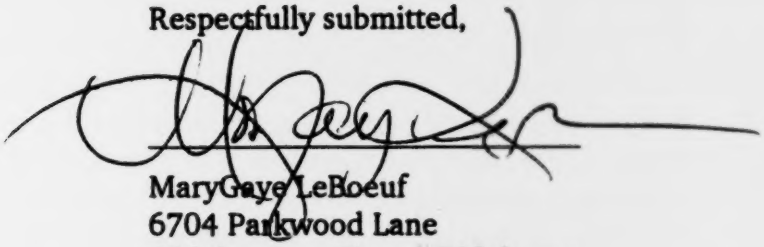
Thus, it is critical for this Court to grant certiorari and inform taxpayers of the precise dimensions of their due process rights where they are inadequately represented. In attempting to protect their rights, taxpayers must know whether their attempts to intervene in an action brought by the government might bar them from bringing a qui tam following judgment in the government's action even though the taxpayer's rights were, in fact, inadequately represented. Accordingly, this Court must pronounce that anything less than the due process analysis required under *Hansberry v. Lee* will not bar the taxpayers from bringing a qui tam following a judgment in an action brought by the government on the same claims. Similarly, if this Court finds that there is a lesser standard of due process for taxpayers bringing a qui tam action, it is this Court's duty to announce that rule and define its parameters so that the taxpayers will know their rights and be better able to protect those rights.

Taxpayers' right to be heard and present evidence must be protected.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,



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Supreme Court, U.S.
FILED

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OFFICE OF THE CLERK

No.

IN THE

Supreme Court of the United States

THE STATE OF OKLAHOMA, ex rel., Moshe Tal, and Taxpayers Against Ripoffs ("T.A.R."), an association of more than ten resident taxpayers of the City of Oklahoma City, Oklahoma,

Petitioners,

v.

THE CITY OF OKLAHOMA CITY, OKLAHOMA, et al.,

Respondents.

On Petition For Writ Of Certiorari To The Supreme Court of Oklahoma

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI

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APPENDIX TO PETITION FOR A WRIT OF CERTIORARI

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APPENDIX TO PETITION FOR A WRIT OF CERTIORARI

I. RULE 14 1(h)(i)(i): Opinion and order entered in conjunction with the judgment sought to be reviewed:

1. Oklahoma Supreme Court Opinion - *The State of Oklahoma, ex rel. Tal v. The City of Oklahoma City, et al.*, 2000 OK 70, 19 P.3d 268. Decided Sept. 26, 2000. Rehearing Denied Feb. 5, 2001.

2000 OK 70 **(Cite as: 19 P. 3d 268)**

SUPREME COURT OF OKLAHOMA.

The STATE of Oklahoma, ex rel., Moshe TAL, resident taxpayer of The City of Oklahoma City; and Taxpayers Against Ripoffs ("T.A.R."), an association of more than ten resident taxpayers of the City of Oklahoma City, Oklahoma,

Plaintiffs-Appellants,

v.

The CITY OF OKLAHOMA CITY, Oklahoma, a municipal corporation; Ronald J. Norick, in his personal and official capacity as the former Mayor of the City; Kirk D. Humphreys, in his personal and official capacity as the Mayor of the City; James E. Thompson, in his personal and official capacity as Assistant City Manager & former MAPS Director; William O. West, in his personal and official capacity as City's' Assistant Municipal Counselor; Daniel T. Brummitt, in his personal and official capacity as City's Assistant Municipal Counselor; The Oklahoma City Urban Renewal Authority, a public body corporate; Tiana P. Douglas, in her personal and official capacity as the Executive Director of Urban Renewal; Stanton L. Young, Fred Jones Hall, J. Larry Nichols, Warren Gardener, and James R. Tolbert III, in his personal and official capacities as Commissioners of Urban Renewal; William (Bill) O. Johnstone, in his personal and official capacity as the former

Commissioner of Urban Renewal; Dan Batchelor, in his personal and official capacity as legal counselor of Urban Renewal; Bricktown Parking Investors, L.L.C., an Oklahoma limited liability company; Bricktown-Tmk/Hogan Parking, L.L.C., an Oklahoma limited liability company; Okc Athletic Club Limited Partnership; Bap- Bricktown, L.L.C., an Oklahoma limited liability company; Tmk/Hogan Entertainment, L.L.C., an Oklahoma limited liability company; Torchmark Corporation (TMK), an Alabama corporation; Torchmark Development Corporation, and TMK Income Properties, both subsidiaries of TMK; Dan Randolph (Randy) Hogan; Edwards Theatres Circuit, Inc., a California corporation; Oklahoma Gas & Electric Company (OG & E), an Oklahoma Corporation; The Benham Group, an Oklahoma corporation; and John Does 1-50; Defendants- Appellees.

No. 94,874.

Sept. 26, 2000.

Rehearing Denied Feb. 5, 2001.

Taxpayers and taxpayers' organization brought qui tam action against city, challenging city's development project. The District Court, Oklahoma County, Niles Jackson, J., dismissed action, and appeal was taken. The Supreme Court held that determination in city's prior declaratory judgment action that plaintiffs did not have standing to intervene because they failed to show that city was not adequately representing their interests precluded subsequent qui tam action regarding the same project.

Affirmed.

Watt, J., filed opinion concurring in part and dissenting in part.

West Headnotes

[1] **Judgment** 713(1)

228k713(1) Most Cited Cases

Determination in city's prior declaratory judgment action regarding legality of city's development project, that taxpayer and taxpayers' organization did not have standing to intervene because they failed to show that city was not adequately representing their interests, precluded taxpayer and organization from bringing subsequent qui tam action regarding the same project. 62 Okl.St.Ann. §§ 372, 373.

[2] **Appeal and Error** 361(2)

30k361(2) Most Cited Cases

Failure of taxpayer and taxpayers' organization to divulge in their petition in error relationship between their qui tam action and city's prior declaratory judgment action regarding the same development project, on appeal from order dismissing qui tam action, violated requirement that petitions in error state related prior appeals.

[3] **Judgment** 713(1)

228k713(1) Most Cited Cases

Determination in city's prior declaratory judgment action that taxpayer and taxpayers' organization lacked standing to pursue qui tam action arising from city's development project barred taxpayer and organization from pursuing any qui tam action regarding the project, regardless of the defendant's identity. 62 Okl.St.Ann. §§ 372, 373.

***269** Appeal from the District Court of Oklahoma County, Oklahoma; Honorable Niles Jackson District Judge.

§ 0 The trial court dismissed the petition of Appellants Moshe Tal, et al., who denominate themselves as "an association known as Taxpayers Against Ripoffs ('T.A.R.')" and who sued on relation of the State of Oklahoma in a *qui tam* action. We hold that the trial court correctly dismissed Appellants' petition.

TRIAL COURT'S ORDER OF DISMISSAL AFFIRMED.

Mary Gaye LeBoeuf, Oklahoma City, Oklahoma, for Plaintiffs-Appellants.

Melvin R. McVay, Jr., Robert N. Sheets, Heather L. Hintz, Ellen K. Spiropolous, Phillips, McFall McCaffrey, McVay & Murrah, Oklahoma City, Oklahoma, for Defendants-Appellees, Bricktown TMK/Hogan Entertainment, L.L.C., Bricktown Parking Investors, L.L.C., OKC Athletic Club, TMK/Hogan, Hogan Properties, and Dan Randolph Hogan.

John T. Edwards, Monnet, Hayes, Bullis, Thompson & Edwards, Oklahoma City, Oklahoma, for Defendant-Appellee, Torchmark Corporation.

Patrick M. Ryan, Phillip G. Whaley, Ryan & Whaley, Oklahoma City, Okl. for Defendant-Appellee, Edwards Theatres Circuit, Inc.

James F. Davis, Kieran D. Maye, Jr, Sheila D. Tims, L. Elizabeth Brown, Andrews, Davis, Legg, Bixler, Milsten, & Price, Oklahoma City, Oklahoma for Defendants-Appellees, The City of Oklahoma City, Oklahoma, *270 Ronald J. Norick, Kirk D. Humphreys, James E. Thompson, William O. West, and Daniel T. Brummitt.

James Dan Batchelor and Janis S. Powers, Batchelor & Powers, Oklahoma City, Oklahoma for Defendants-Appellees, Oklahoma City Urban Renewal authority, Authority Commissioners Stanton L. Young, Fred Jones Hall, J. Larry Nichols, Warren Gardner, James R. Tolbert III, former Commissioner William O. (Bill) Johnstone, Executive Director Tiana P. Douglas and General Counsel James Dan Batchelor.

Joseph H. Bocock, Robert J. Ross, McAfee & Taft, Oklahoma City, Okl. for Defendant-Appellee, Bap-Bricktown, L.L.C.

Rod L. Cook, Roberta Browning Fields, Patricia L. Franz, Rainey, Ross, Rice & Binns, Oklahoma City, Okl. for Defendant-Appellee, Oklahoma Gas & Electric Company (OG & E).

OPINION

PER CURIAM,

§ 1 On March 15, 2000, Plaintiffs, Moshe Tal and a group of Oklahoma City citizens he organized called Taxpayers Against Ripoffs (T.A.R.), filed suit against the City of Oklahoma City and many other defendants under the *Qui Tam* statutes, 62 O.S.1991 §§ 372 and 373. [FN1] Tal's and T.A.R.'s suit was based on a notice, denominated a "Written Demand," which they had filed with the City Clerk on January 12, 1999. Defendants moved to dismiss on the ground that this Court had held in City of Oklahoma City v. Oklahoma City Urban Renewal Authority, 1999 OK 71, 988 P.2d 901, Tal I, that Tal and T.A.R. lacked standing to prosecute a *Qui Tam* action. Prior to filing his Written Demand Tal had led a group that had made an unsuccessful bid to develop a part of the Bricktown project. The nature of the project and Tal's claims are spelled out in some detail in Tal I.

FN1. Title 62 O.S.1991 § 372 provides:

> Every officer of the state and of any county, township, city, town or school district, who shall hereafter order or direct the payment of any money or transfer of any property belonging to the state or to such county, city, town or school district, in settlement of any claim known to such officers to be fraudulent or void, or in pursuance of any unauthorized, unlawful or fraudulent contract or agreement made or attempted to be made, for the state or any such county, city, town or school district, by any officer thereof, and every person, having notice of the facts, with whom such unauthorized, unlawful or fraudulent contract shall have been made, or to whom, or for whose benefit such money shall be paid or such transfer of property shall be made, shall be jointly and severally liable in damage to all innocent persons in any manner injured thereby, and shall be furthermore jointly and severally liable to the state, county, city, town or

school district affected, for triple the amount of all such sums of money so paid, and triple the value of property so transferred, as a penalty, to be recovered at the suit of the proper officers of the state or such county, city, town or school district, or of any resident taxpayer thereof, as hereinafter provided.

Title 62 O.S.1991 § 372 provides:

Upon the refusal, failure, or neglect of the proper officers of the state or of any county, township, city, town, or school district, after written demand made upon them by ten resident taxpayers of the state or such county, township, city, town, or school district, to institute or diligently prosecute proper proceedings at law or in equity for the recovery of any money or property belonging to the state, or such county, township, city, town, or school district, paid out or transferred by any officer thereof in pursuance of any unauthorized, unlawful, fraudulent, or void contract made, or attempted to be made, by any of its officers for the state or any such county, township, city, town, or school district, or for the penalty provided in the preceding section, any resident taxpayer of the state or such county, township, city, town, or school district affected by such payment or transfer after serving the notice aforesaid and after giving security for cost, may in the name of the State of Oklahoma as plaintiff, institute and maintain any proper action which the proper officers of the State, county, township, city, town, or school district might institute and maintain for the recovery of such property, or for said penalty; and such municipality shall in such event be made defendant, and one-half (½) the amount of money and one-half (½) the value of the property recovered in any action maintained at the expense of a resident taxpayer under this section, shall be paid to such resident taxpayer as a reward.

§ 2 In Tal I, Tal and T.A.R. based their claims on the same Written Demand, dated January 12, 1999, that they rely on

here. The issue in Tal I was whether Tal and T.A.R. had standing to intervene in a declaratory judgment action, which the City of Oklahoma City had filed in response to Tal ***271** and T.A.R.'s Written Demand. We held that Tal and T.A.R. had no such right because,

> ... there is nothing in the record to reflect that Oklahoma City acted in bad faith. Its actions were taken under the glare of public scrutiny and were resisted by a significant minority of the City Council. That the disagreements among Council members were resolved in a way that Tal and the other T.A.R. members do not like does not support in any way T.A.R.'s claim that the Development Agreements were either fraudulent, unlawful, or otherwise inadequate.

Tal I, 1999 OK 71 at § 20, 988 P.2d 901. Appellee's contended in their brief in support of their motions to dismiss that our opinion in Tal I precluded the re-litigation of Tal and T.A.R.'s claims because it determined that Tal and T.A.R. lacked standing to prosecute a *Qui Tam* action under their Written Demand of January 12, 1999 against the City and the other appellees. We agree.

§ 3 In their brief in opposition to appellants' motions to dismiss, Tal and T.A.R. reargued the claims that they had unsuccessfully asserted in Tal I. They claimed that the City could not adequately represent Tal and T.A.R.'s interests and that the allegations in their Written Demand showed that they had a right to prosecute a *Qui Tam* action. Nowhere in their brief did Tal and T.A.R. attempt to explain why they had standing to prosecute a *Qui Tam* action under their Written Demand, although we had held in Tal I that they lacked standing to do so.

§ 4 Tal and T.A.R. filed a second action that resulted in a second appeal in Tal v. Norick, 1999 OK 85, 991 P.2d 999, Tal II. There, Tal and T.A.R. brought another *Qui Tam* suit against the City and others that involved the Bricktown Ballpark project. In Tal II we affirmed the trial court, who had granted

the defendants' motions to dismiss saying,

> The arguments Tal and T.A.R. make here were fully discussed and disposed of in Tal I. The similarity between the record presented here and the record we considered in Tal I convinces us that there is no reason to restate here our reasoning in Tal I. We therefore hold that the trial court did not err in concluding that the *qui tam* action was prematurely brought.

Tal II, 1999 OK 85 at § 9, 991 P.2d 999. We so held because we had previously held in Tal I that the City of Oklahoma City had adequately represented the interests of all its taxpayers, including the members of T.A.R., and was entitled to the presumption that it was doing so in good faith. In their brief Tal and T.A.R. disingenuously claimed that because the trial court in Tal II had dismissed their suit there because it was "premature," they had a right to bring this suit. But Tal II involved a different written demand and a different project. Further, we expressly held in Tal II that the issues in Tal I and Tal II were "substantially similar." Tal II, at § 8. Nothing in Tal II, therefore, supports Tal and T.A.R.'s claim that they had a right to reassert here the claims they had made in Tal I.

§ 5 Although, a central issue in this appeal is whether the appeal is a collateral attack on the judgment entered in Tal I, Tal and T.A.R. failed to fulfill the requirements of Part III of our petition in error form, which calls for information concerning "Related or Prior Appeals." [FN2] All prior appeals involving the same parties or involving the same issue must be divulged and *if there are none the appellant must so state.* Nevertheless, Tal and T.A.R. left blank this section of their petition in error.

> FN2. Part III of the petition in error form reads in its entirety as follows:
>
> III. RELATED OR PRIOR APPEALS
>
> List all prior appeals involving same parties or same

trial court proceeding:

List all related appeals involving same issues:

(Identify by Style, Appeal Number, Status, and citation, if any. *If none, so state.*)

Emphasis added.

[1][2] § 6 We hold that Tal and T.A.R.'s *Qui Tam* action here raises issues that were disposed of in Tal I. The trial court, therefore, correctly dismissed Tal and T.A.R.'s suit. In Tal I we held that Tal and T.A.R. lacked standing to prosecute a *Qui Tam* ***272** action because they failed to make a showing that the City was not adequately representing their interests. That holding should have ended Tal and T.A.R.'s attacks against the City and the other participants in the Bricktown development projects but it did not do so. We hold that Tal and T.A.R.'s claims here were clearly and unequivocally disposed of in Tal I. Further, Tal and T.A.R. violated our rules in failing to divulge in their petition in error in this appeal the relationship between this appeal, Tal I, and Tal II.

[3] § 7 Finally, we address Tal and T.A.R.'s August 28, 2000 motion to strike the supplement to the record filed by OG & E. Tal and T.A.R. claim that OG & E's supplement should be stricken because OG & E's motion to dismiss was not ruled on in the trial court order dismissing the actions against the other defendants. We disagree.

§ 8 Clearly, our ruling in Tal I, which we have reaffirmed here, stands for the proposition that Tal and T.A.R. lacked standing to prosecute *Qui Tam* actions arising from the Bricktown project, regardless of whom the individual defendants might be. Tal and T.A.R. have no more standing to prosecute a *Qui Tam* action against OG & E than they had to prosecute one against the other defendants to this appeal. Although we think this fact should by now be clear to Tal and T.A.R., we are

concerned that Tal and T.A.R.'s pending motion might have been designed to create a circumstance that they believed would allow them to prosecute yet another appeal in this case after this one. Tal and T.A.R.'s motion to strike OG & E's supplement to the record is, therefore, denied.

§ 9 We affirm the trial court's order dismissing Tal and T.A.R.'s action because Tal and T.A.R. lack standing to prosecute this action concerning the Bricktown project.

TRIAL COURT'S ORDER OF DISMISSAL AFFIRMED

SUMMERS, C.J., HARGRAVE, V.C.J., HODGES, LAVENDER, KAUGER, BOUDREAU, and WINCHESTER, JJ.--concur.

WATT, J.--concurring in part, dissenting in part.

OPINION CONCURRING IN PART AND DISSENTING IN PART

WATT, Justice,

§ 1 I concur in the majority's conclusion that Tal and T.A.R.'s action giving rise to this appeal is barred as a result of our finding in Tal I that Tal and T.A.R. lacked standing to prosecute any further action concerning the Bricktown project. I dissent, however, because of the majority's failure to address what is to me quite clear: that Tal and T.A.R.'s conduct in filing and prosecuting this action is likely sanctionable. Tal and T.A.R. filed and continue to prosecute this appeal, despite the fact that the suit giving rise to this appeal is based on the same *Qui Tam* notice that this Court held more than a year ago failed to show Tal and T.A.R. had standing to prosecute a *Qui Tam* action. Further, this is but the latest episode in serial lawsuits and appeals by Tal and T.A.R. that have hindered the Bricktown project, including, according to appellees, the loss of investors who have refused to participate only because of this constant litigation. The potential losses to the Bricktown project participants created by this serial litigation cannot have been lost on Tal and T.A.R.

§ 2 Sanctions in the form of additional costs and attorneys' fees are awardable under Rule 1.2, Oklahoma Supreme Court Rules; [FN1] 12 O.S. Supp.1996 § 995 ; [FN2] and *27320 O.S.1991 § 15.1, [FN3] for filing and prosecuting appeals that are non-meritorious, frivolous, or violate the Court's rules. It appears to me that Tal and T.A.R. have likely violated some or all of these provisions. Consequently I would have granted leave to appellees to file in the trial court motions for appropriate sanctions from the violation of the last cited statutes and Court Rule in the conduct of this appeal, and, should any of the appellees decide to file such motions, I would direct the trial court to hear and decide them. In this connection, I note that the trial court has granted appellees' motions for sanctions and attorneys' fees incurred as a result of Tal and T.A.R.'s conduct in having filed the suit in the first place.

FN1. Rule 1.2 provides,

Compliance with these rules is required. In case of failure to comply with any rule or order of the Court, the Court may continue or dismiss a cause, reverse or affirm the judgment appealed, render judgment, strike a filing, assess costs or take any other action it deems proper.

FN2. Title 12 O.S. Supp.1996 § 995 provides: The Oklahoma Supreme Court or Court of Civil Appeals shall dismiss an appeal that is frivolous, and may impose sanctions against the appellant, the appellant's attorney, or both. The sanctions that may be imposed may include the reasonable expenses incurred because of the filing of the appeal, including a reasonable attorney's fee. The court shall dismiss a cross-appeal or an original proceeding that is frivolous and may impose sanctions as provided by this section.

FN3. Title 20 O.S.1991 § 15.1 provides:

On any appeal to the Supreme Court, the prevailing party may petition the court for an additional attorney fee for

> the cost of the appeal. In the event the Supreme Court or its designee finds that the appeal is without merit, any additional fee may be taxed as costs.

§ 3 In their August 28, 2000 motion to strike the supplement to the record filed by OG & E, Tal and T.A.R. claim that OG & E's supplement should be stricken because OG & E's motion to dismiss was not ruled on in the trial court order dismissing the actions against the other defendants. I concur in the majority's ruling denying that motion but it seems to me that a discussion of Tal and T.A.R.'s possible motives in filing their motion is in order.

§ 4 Clearly, this Court's ruling in Tal I, which has been reaffirmed here, stands for the proposition that Tal and T.A.R. lacked standing to prosecute *Qui Tam* actions arising from the Bricktown project, regardless of whom the individual defendants might be. As noted by the majority, Tal and T.A.R. have no more standing to prosecute a *Qui Tam* action against OG & E than they had to prosecute one against the other defendants to this appeal. Although, it seems to me, this fact should by now be clear to Tal and T.A.R., I am concerned that Tal and T.A.R.'s August 28, 2000 motion might have been designed to create a circumstance that they believed would allow them to prosecute yet another appeal in this case after this one. On this score I observe that motions for sanctions for Tal and T.A.R.'s conduct in this case are presently pending and I would have granted appellants leave *sua sponte* to file additional motions for sanctions. I would expect, therefore, that Tal and T.A.R. would engage in no more conduct designed to lengthen this litigation or any other arising from the Bricktown development.

§ 5 I join in the majority's affirmation of the trial court's order dismissing Tal and T.A.R.'s action because Tal and T.A.R. lack standing to prosecute any action concerning the Bricktown project. I dissent because I would have remanded the matter to the trial court with instructions to hear and decide, under Rule 1.2, Oklahoma Supreme Court Rules; 12 O.S. Supp.1996

§ 995 ; and 20 O.S.1991 § 15.1, any motions for sanctions or other appropriate relief that appellees may file arising out of Tal and T.A.R.'s conduct in their prosecution of this appeal.

END OF DOCUMENT

2. *Journal Entry of Judgment*, District Court of Oklahoma County, Oklahoma CJ-2000-2052 - filed May 23, 2000

IN THE DISTRICT COURT OF OKLAHOMA COUNTY

STATE OF OKLAHOMA

THE STATE OF OKLAHOMA, ex rel., Moshe Tal, a resident taxpayer of The City of Oklahoma City, et al.,	)	No: CJ-2000-2052
Plaintiffs,	)	
vs.	)	
THE CITY OF OKLAHOMA CITY, a municipal corporation, et. al.,	)	
Defendants.	)	

JOURNAL ENTRY OF JUDGMENT

1. The captioned matter came before this Court on the motions to dismiss the Petition described below.

2. The Petition was filed by "Members of T.A.R.," Moshe Tal, Ronald D. Benton, Lisa (Michelle) Bowers, Tracy (Joe) Ford (a/k/a/ "T.J.", Robby (James) Lovett, W.D. McGowen, Dhybon McGowen, Dr. John Migliaccio, Steve Migliaccio, Physilla (Jo) Polley, Edna (Ennise) Richardson, Morning-Star Takapu, Kasey (Leigha) Toms, and Michael (Lawrence) Toms (collectively the "Plaintiffs") against multiple defendants.

3. Motions to dismiss the Petition were filed by the following defendants:

   a. Oklahoma City Urban Renewal Authority, Stanton L. Young, Fred Jones Hall, J. Larry Nichols, Warner

Gardner, James R. Tolbert III, William O. ("Bill") Johnstone, Tiana P. Douglas and Dan Batchelor;

b. The City of Oklahoma City, Ronald J. Norick, Kirk D. Humphreys, James E. Thompson, William O. west and Daniel T. Brummitt;

c. BAP-Bricktown L.L.C., TMK/Hogan, Hogan Property Management, L.L.C., Dan Randolph Hogan, OKC Athletic Club Limited Partnership, Bricktown Parking Investors, L.L.C., Bricktown TMK/Hogan Entertainment, L.L.C., and Bricktown TMK/Hogan Parking L.L.C..

4. Having reviewed the Petition, being familiar with this Court's file in *City of Oklahoma City v. Oklahoma City Urban Renewal Authority, et al.*, CJ-99-487-67 (District Court of Oklahoma County), having reviewed the arguments contained in the motions, brief in opposition, and replies, and being fully appraised of the premises,

THE COURT FINDS, ORDERS, ADJUDGES AND DECREES that:

1. The motion to dismiss filed by Oklahoma City Urban Renewal Authority, Stanton L. Young, Fred Jones Hall, J. Larry Nichols, Warner Gardner, James R. Tolbert III, William O. ("Bill") Johnstone, Tiana P. Douglas and Dan Batchelor should be and hereby is sustained and the Petition is dismissed with prejudice as to each of them.

2. The motion to dismiss filed by the City of Oklahoma City, Ronald J. Norick, Kirk D. Humphreys, James E. Thompson, William O. west and Daniel T. Brummitt should be and hereby is sustained and the Petition is dismissed with prejudice as to each of them.

3. The motion to dismiss filed by BAP-Bricktown L.L.C., TMK/Hogan, Hogan Property Management, L.L.C., Dan Randolph Hogan, OKC Athletic Club Limited

Partnership, Bricktown Parking Investors, L.L.C., Bricktown TMK/Hogan Entertainment, L.L.C., and Bricktown TMK/Hogan Parking L.L.C. should be and hereby is sustained and the Petition is dismissed with prejudice as to each of them.

THE COURT FURTHER FINDS, ORDERS, ADJUDGES AND DECREES, and all parties have stipulated, the Plaintiffs' claims against Defendants Edwards Theatres Circuit, Inc., Torchmark Corporation, Oklahoma Gas and Electric Company, The Benham Group, Torchmark Development Corporation, and TMK/Hogan Income Properties, L.P., are derived from and dependent upon or related to the claims that have been dismissed against the other defendants.

THE COURT FURTHER FINDS, ORDERS, ADJUDGES AND DECREES, that because of the derivative nature of the Plaintiffs' claims against the defendants Edwards Theatres Circuit, Inc., Torchmark Corporation, Oklahoma Gas and Electric Company, The Benham Group, Torchmark Development Corporation, and TMK/Hogan Income Properties, Plaintiffs' Petition should be and is hereby dismissed with prejudice as to each of them.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that this is a final determination of Plaintiffs' claims against all defendants, and each of them is awarded judgment, and judgment is entered on their behalf and against Plaintiffs, and each of them.

s/Niles Jackson

NILES JACKSON

JUDGE OF THE DISTRICT COURT

[11 PAGES OF PARTIES' SIGNATURES OMITTED]

II. RULE 14 1(h)(i)(ii): Other relevant opinions and orders in companion cases:

1. Oklahoma Supreme Court Opinion - *City of Oklahoma City v. Oklahoma City Urban Renewal Authority, et al,* 1999 OK 71, 988 P.2d 901 - Aug. 30, 1999. As Corrected Sept. 1, 1999. Rehearing Denied Sept. 30, 1999. (a/k/a/ *Tal I*)

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988 P.2d 901 - 1999 OK 71

(Cite as: 988 P.2d 901)

Supreme Court of Oklahoma.

The CITY OF OKLAHOMA CITY, a municipal corporation, Plaintiff-Appellee,

v.

The OKLAHOMA CITY URBAN RENEWAL AUTHORITY, a public body corporate; Bricktown Parking Investors, L.L.C., an Oklahoma limited liability company; and Bricktown TMK/Hogan Entertainment, L.L.C., an Oklahoma limited liability company,

Defendants-Appellees,

v.

Moshe Tal, Lisa (Michelle) Bowers, Dr. John Miglaccio, Steve Miglaccio, Joy Parker, Physilla (Jo) Polley, Edna (Ennise) Richardson, Morning-Star Takapu, Robby (James) Lovett, W.D. Mcgown, and Michael (Lawrence) Toms, individually and as an association known as Taxpayers Against Ripoffs ("T.A.R."),

Appellants.

No. 92,874.

Aug. 30, 1999.

As Corrected Sept. 1, 1999.

Rehearing Denied Sept. 30, 1999.

Individual taxpayer and taxpayer group brought motions for permissive intervention in city's declaratory judgment action relating to the legality of a development agreement. The District Court, Oklahoma County, Karl Gray, J., denied the motions. Taxpayers appealed. The Supreme Court, Watt, J., held that: (1) as a matter of first impression, city's declaratory judgment action presented a justiciable and actual controversy, within meaning of declaratory judgment statute, though both city and the defendant developers agreed that the development agreement was legal, and (2) taxpayers did not rebut the presumption that city would act in good faith in the declaratory judgment action.

Affirmed.

Summers, C.J., concurred in result.

West Headnotes

[1] **Parties ⇨40(1)**

287k40(1) Most Cited Cases

Taxpayers may intervene in an action brought by a public body only if the public body fails to respond to a written demand with action taken in good faith. 62 Okl.St.Ann. §§ 372, 373.

[2] **Parties ⇨44**

287k44 Most Cited Cases

Whether taxpayers have met the burden of showing the public body failed to respond to a written demand with action taken in good faith, as basis for taxpayer intervention in the action, is left to the sound discretion of the trial court. 62 Okl.St.Ann. §§ 372, 373.

[3] **Declaratory Judgment ⇨306**

118Ak306 Most Cited Cases

Taxpayers' allegations that a more attractive development agreement might have been made and that city council members had disagreed as to which developer should be awarded the development agreement did not rebut the presumption that city would act in good faith in declaratory judgment action regarding the legality of the agreement, and thus, taxpayers were not entitled to permissive intervention in the declaratory judgment action. 12 Okl.St.Ann. § 2024, subd. B, par. 2; 62 Okl.St.Ann. §§ 372, 373.

[4] **Declaratory Judgment ⇨392.1**

118Ak392.1 Most Cited Cases

Individual taxpayer and taxpayer group were not prejudiced by trial court's denial of their motions for permissive intervention in city's declaratory judgment action relating to legality of development agreement, where the trial court considered individual taxpayer's 129-page deposition and the depositions of group members regarding the alleged unlawfulness of the agreement and considered the group's written demand to the city alleging city's failure to prosecute for return of money or property. 12 Okl.St.Ann. § 2024, subd. B, par. 2; 62 Okl.St.Ann. §§ 372, 373.

[5] **Declaratory Judgment ⇨209**

118Ak209 Most Cited Cases

City's declaratory judgment action regarding legality of development agreement presented a justiciable and "actual controversy," within meaning of declaratory judgment statute, though both city and the defendant developers agreed that the development agreement was legal, where the action placed at issue in an unbiased court the contentions of taxpayer group that the agreement was fraudulent or otherwise unlawful and the trial court heard the taxpayer group's arguments. 12 Okl.St.Ann. § 1651.

***902** Appeal from the District Court of Oklahoma County,

Oklahoma, Honorable Karl Gray, District Judge.

§ 0 The trial court denied the motion to intervene and motion for continuance of Appellants Moshe Tal, et al., who denominate themselves as Aan association known as Taxpayers Against Ripoffs ('T.A.R.')." We hold that the record supports the trial court's order.

JUDGMENT OF THE TRIAL COURT AFFIRMED

William O. West, Municipal Counselor, and David Brummitt, Assistant Municipal Counselor, for Appellee, City of Oklahoma City.

Dan Batchelor and Janis Powers, Batchelor and Powers, Oklahoma City, Oklahoma, for Appellee, Oklahoma City Urban Renewal Authority.

Melvin R. McVay, Jr., Robert N. Sheets, Heather L. Hintz, and Ellen K. Spiropoulos, Phillips, McFall McCaffrey, McVay & Murrah, Oklahoma City, Oklahoma, for Appellees, Bricktown Parking Investors, L.L.C. ***903** and Bricktown TMK/Hogan Entertainment, L.L.C.

Bryce S. Kennedy, Jr., Kennedy & Associates, Enid, Oklahoma, for Appellants.

OPINION

WATT, Justice.

§ 1 This is an appeal from the order of the District Court of Oklahoma County, Honorable Karl Gray, District Judge, denying the motion to intervene and motion for continuance of Moshe Tal and others, who call themselves "an association known as Taxpayers Against Ripoffs ('T.A.R.')." Appellants appeal from the trial court's order. Tal is an unsuccessful bidder for the Redevelopment Agreements on the MAPS Bricktown Redevelopment Project, which Agreements were ultimately awarded to appellees, Bricktown Parking Investors and TMK/Hogan.

FACTS AND PROCEDURAL BACKGROUND

§ 2 On January 12, 1999 Tal, and the other members of T.A.R., signed a Written Demand, which was delivered to the City Clerk of appellee, City of Oklahoma City pursuant to 62 O.S.1991 §§ 372 and 373. [FN1] Sections 372 and 373 provide that if, after written demand is made by ten resident taxpayers, a public body fails to prosecute proceedings to recover money or property belonging to the public body, which the taxpayers claim was unlawfully or fraudulently obtained, any resident taxpayer may sue in the name of the state to recover the money or property plus treble damages from the officials responsible for the wrongful acts; the taxpayer will be entitled to one-half the money or one-half the value of the property recovered. Such an action is known as a "*Qui tam* " action, that is "An action brought on a penal statute by an informer, who sues for the penalty ..." *The Oxford English Dictionary on CD- ROM* (2d Ed.1994).

FN1. Title 62 O.S.1991 § 372 provides:

Every officer of the state and of any county, township, city, town or school district, who shall hereafter order or direct the payment of any money or transfer of any property belonging to the state or to such county, city, town or school district, in settlement of any claim known to such officers to be fraudulent or void, or in pursuance of any unauthorized, unlawful or fraudulent contract or agreement made or attempted to be made, for the state or any such county, city, town or school district, by any officer thereof, and every person, having notice of the facts, with whom such unauthorized, unlawful or fraudulent contract shall have been made, or to whom, or for whose benefit such money shall be paid or such transfer of property shall be made, shall be jointly and severally liable in damage to all innocent persons in any manner injured thereby, and shall be furthermore jointly and severally liable to the state, county, city, town or school district affected, for triple the amount of all such

sums of money so paid, and triple the value of property so transferred, as a penalty, to be recovered at the suit of the proper officers of the state or such county, city, town or school district, or of any resident taxpayer thereof, as hereinafter provided.

Title 62 O.S.1991 § 373 provides: Upon the refusal, failure, or neglect of the proper officers of the state or of any county, township, city, town, or school district, after written demand made upon them by ten resident taxpayers of the state or such county, township, city, town, or school district, to institute or diligently prosecute proper proceedings at law or in equity for the recovery of any money or property belonging to the state, or such county, township, city, town, or school district, paid out or transferred by any officer thereof in pursuance of any unauthorized, unlawful, fraudulent, or void contract made, or attempted to be made, by any of its officers for the state or any such county, township, city, town, or school district, or for the penalty provided in the preceding section, any resident taxpayer of the state or such county, township, city, town, or school district affected by such payment or transfer after serving the notice aforesaid and after giving security for cost, may in the name of the State of Oklahoma as plaintiff, institute and maintain any proper action which the proper officers of the State, county, township, city, town, or school district might institute and maintain for the recovery of such property, or for said penalty; and such municipality shall in such event be made defendant, and one-half (1/2) the amount of money and one-half (1/2) the value of the property recovered in any action maintained at the expense of a resident taxpayer under this section, shall be paid to such resident taxpayer as a reward.

§ 3 Appellants' Demand alleged that certain Development Agreements, to which Oklahoma City was not a party, and which had been entered into between the Oklahoma City

Urban Renewal Authority, Bricktown Parking Investors, and TMK/Hogan Entertainment, were unlawful. Appellants demanded ***904** that Oklahoma City file a lawsuit to declare the Development Agreements void and to recover certain property that Oklahoma City had conveyed to the Urban Renewal Authority. The record reflects that Moshe Tal had enlisted the support of the other signatories of the Demand, the members of the T.A.R. association.

§ 4 In response to appellants' Demand, Oklahoma City filed a declaratory judgment action against the Urban Renewal Authority, Bricktown Parking Investors, and TMK/Hogan on January 16, 1999. Oklahoma City asked for a declaration that the Development Agreements were lawful and, alternatively if the court should decide that Development Agreements were unlawful, that the court order the Urban Renewal Authority to return the property that Oklahoma City had conveyed to it. Notice of the suit was given to T.A.R.'s attorney. On January 17, 1999, Bricktown Parking Investors filed its Answer, Counterclaim and Cross Claim, and TMK/Hogan filed its answer. On February 3, 1999, upon stipulation of the parties, the trial court entered an order setting the matter for non-jury trial on March 1, 1999.

§ 5 On February 22 and 23, 1999, defendants took the depositions of appellants, T.A.R. members, Moshe Tal, Lisa Bowers, W.D. McGown, Joy Parker, Pyhsilla Jo Polley, Edna Ennise Richardson, Morning-Star Takapu, Michael Toms, and Steve Migliaccio. Appellants' attorneys appeared at each of the depositions. Tal's deposition was 129 pages long. After the trial had commenced, appellants' attorney filed a motion to intervene and for continuance. The trial court, after argument of counsel, considering the depositions of Tal and the other T.A.R. members who had been deposed, and also considering T.A.R.'s Written Demand, denied T.A.R.'s motion to intervene.

§ 6 Tal and the other T.A.R. members appealed from the trial court's ruling. The appellees then filed motions that this Court retain jurisdiction and treat the appeal on an expedited basis.

We granted the appellees' motions. Appellees also moved to dismiss appellants' appeal, which motion we reserved for disposition to the decisional stage of the appeal. As a consequence of the result of this appeal appellees' motions are moot.

§ 7 After the disposition of T.A.R.'s motion to intervene, the case was tried on the merits and the trial court found that the Agreements were lawful and entered a mandatory injunction, which requires that the Urban Renewal Authority carry out the terms of the Agreements between itself and the developers, Bricktown Parking Investors and TMK/Hogan. The record of the trial was made a part of the record on appeal here.

§ 8 The Urban Renewal Authority represents that the developers are relying on their ability to raise money from third party investors and lenders, and upon the participation of a company to commit to build a theater complex in the area. According to the Urban Renewal Authority, the pendency of this appeal has meant that the parties to this litigation have been unable to satisfy the requirements of these third parties, which inability has prevented the them from funding the design and letting a construction contract to carry out improvements to the Bricktown Canal, which failure prevents the Urban Renewal Authority from complying with the requirements of the mandatory injunction. The completion of these improvements are conditions precedent to the development of the Bricktown entertainment complex.

The MAPS Project and the Bricktown Development Plan

§ 9 Some background concerning the MAPS project and the development of the Bricktown area are necessary for a thorough understanding of the issues in this case. The conveyance from Oklahoma City to the Urban Renewal Authority and the Development Agreements between the Urban Renewal Authority, Bricktown Parking Investors, and TMK/Hogan were carried out as part of the Oklahoma City Metropolitan Area Projects program, known as "MAPS." The

MAPS project began with a one-cent sales tax increase, which the voters of Oklahoma City approved in 1993. The MAPS sales tax produced $300,000,000.00 to be used in the construction of new projects, including the *905 Bricktown Ball Park, the Bricktown Canal, and the renovation of existing structures, such as the Myriad Convention Center.

§ 10 One of the MAPS program's primary purposes is to attract private investors to invest in the areas being developed as part of the program. To this end, Oklahoma City's City Council passed a Redevelopment Plan for the Bricktown area in 1997. The Redevelopment Plan was designed to attract private investors to build sports related parking and entertainment related improvements. Appellant Moshe Tal was the leader of one group of investors who sought the contracts to carry out the Redevelopment Plan but the City Council, after widely publicized hearings and based on an extremely close vote, ultimately awarded the Development Agreements to Bricktown Parking Investors and TMK/Hogan rather than to Tal's group. The final decision was made by the City Council only after two years of public meetings, public notices, public hearings, and citizen review.

§ 11 Oklahoma City had conveyed property it had acquired in the area to the Urban Renewal Authority with the proviso that Oklahoma City would receive the net proceeds from the sale of the property by the Urban Renewal Authority and that the price paid to the Urban Renewal Authority for the property would "be not less than the actual 'fair market value' of said property." The property was appraised on three separate occasions by professional appraisers before it was sold. The trial court found and the record supports that the Urban Renewal Authority received fair market value for the property.

§ 12 T.A.R. also complained that the Agreements failed to serve a public purpose and provided insufficient safeguards and accountability to the Urban Renewal Authority and Oklahoma City. The trial court held that the Agreements did provide for adequate accountability and safeguards.

§ 13 After receiving the property and in furtherance of the redevelopment plan, the Urban Renewal Authority made Development Agreements with Bricktown Parking Investors and TMK/Hogan. Under its Agreement with the Urban Renewal Authority, TMK/Hogan will purchase a development site at its fair market value of about $3.3 million and develop the Bricktown entertainment Center at an estimated cost of over $30 million. Bricktown Parking Investors agreed to develop 1,200 parking spaces, subject to the later relocation of the parking to another site in order to make room for the development of the Entertainment Center.

ISSUE

§ 14 There is but a single, narrow issue in this case: Did the trial court err in denying T.A.R.'s motions to intervene and for continuance? We hold that the trial court correctly denied T.A.R.'s motions.

DISCUSSION

§ 15 The right of one to intervene in litigation to which he is not a party is governed by 12 O.S.1991 § 2024.B.2, which authorizes a court to allow permissive intervention only under the following circumstances:

> When an applicant's claim or defense and the main action have a question of law or fact in common. When a party to an action relies for ground of claim or defense upon any statute or executive order administered by a federal or state governmental officer or agency or upon any regulation, order, requirement or agreement issued or made pursuant to the statute or executive order, the officer or agency upon timely application may be permitted to intervene in the action. In exercising its discretion the court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties.

Tal and T.A.R. do not claim that T.A.R. was entitled to intervene as of right. Their claim is that the trial court erred

in not allowing T.A.R. to intervene on a permissive basis under § 204.B.2.

§ 16 As previously noted, Tal and T.A.R. formulated their motion to intervene as a *qui tam* action under 62 O.S.1991 §§ 372 and 373, which started with T.A.R.'s "Written Demand" in which it claimed a right to a reward of one-half of any amounts recovered. ***906** Under the record, T.A.R. was not entitled to intervene as a *qui tam* plaintiff.

I. T.A.R. failed to show that Oklahoma City had acted in bad faith. Such a showing is a prerequisite to any right to intervene.

[1][2] § 17 Taxpayers may intervene in an action brought by a public body only if the public body fails to respond to a written demand with action taken in good faith. Braly v. Ford, 1941 OK ---- 116 P.2d 988. Whether that burden has been met is left to the sound discretion of the trial court. Tulsa Rock Co. v. Williams, 1982 OK 10 § 5, 640 P.2d 530.

[3] § 18 T.A.R. claims that Oklahoma City's suit was non responsive to T.A.R.'s Demand because Oklahoma City failed to support T.A.R.'s claims. We hold that Oklahoma City was not required to do so. In Braly we held

Public officers are always presumed, in the absence of any showing to the contrary, to be ready and willing to perform their duty; and until it is made to appear that they have refused to do so, or have neglected to act under circumstances rendering this equivalent to a refusal, there is no occasion for the intervention of the citizen for the protection of himself and others similarly situated.

116 P.2d at 990 (Citation omitted.)

§ 19 T.A.R. claims that Braly is distinguishable from the facts in the case at bar but we find this claim unconvincing. T.A.R. relies on State ex rel. Lockhart v. Board of Com' rs of Lincoln County, 1946 OK ----, 197 Okla. 605, 173 P.2d 725. There we held that allegations of fraud were sufficient to

state a cause of action. But Lockhart involved the question of what is required at the pleading stage to successfully resist a demurrer to the petition being sustained. Here the issue is much different from the issue involved in Lockhart. The case has been tried and the record developed supports the trial court's finding that the property at issue was sold at its fair market value and that the protections for the public to safeguard its interests spelled out in the Agreements were adequate. This ends the inquiry and T.A.R.'s expression of a contrary opinion in its Demand, without factual support, does not change the result.

§ 20 T.A.R. would have us reverse the presumption of good faith to which Oklahoma City is entitled and assume that, without T.A.R.'s intervention, Oklahoma City would act in bad faith. In any event, there is nothing in the record to reflect that Oklahoma City acted in bad faith. Its actions were taken under the glare of public scrutiny and were resisted by a significant minority of the City Council. That the disagreements among Council members were resolved in a way that Tal and the other T.A.R. members do not like does not support in any way T.A.R.'s claim that the Development Agreements were either fraudulent, unlawful, or otherwise inadequate.

§ 21 That a more attractive deal for Oklahoma City might have been made, as T.A.R. asserts it could and should have been made, is not for this Court's consideration. Such issues were for the City Council and the City Council resolved them. There being no showing of fraud or unlawful activity here, T.A.R. lacks standing to attack the City Council's decisions.

[4] § 22 Tal claims that the failure of the trial court to allow him to intervene and hear his testimony was prejudicial to his rights and those of T.A.R. We note, however, that the trial court considered Tal's 129 page deposition and Tal does not suggest that there are any facts to support his claims of unlawfulness beyond those contained in the allegations in T.A.R.'s Demand. The trial court read and considered

T.A.R.'s Written Demand and the depositions of all its members. It is obvious that the trial court concluded that the factual allegations in T.A.R.'s Demand and the deposition testimony of its members were insufficient to support T.A.R.'s claim for intervention. For the reasons previously discussed, we agree.

§ 23 Because we conclude that Moshe Tal's petition for intervention was correctly denied, he stands excluded as a party litigant below and has no standing to tender for our review any errors made by the trial court.

***907** *II. Oklahoma City' s action against the Urban Renewal Authority, Bricktown Parking Investors, and TMK/Hogan was a justiciable case or controversy.*

[5] § 24 T.A.R. contends that Oklahoma City's action against the Urban Renewal Authority, Bricktown Parking Investors, and TMK/Hogan was not a justiciable case or controversy because the parties agreed that the Development Agreements were valid. In support of its claim on this issue T.A.R. cites Gordon v. Followell, 1964 OK 74, 391 P.2d 242. Gordon, however, does not support T.A.R.'s claim. There we said, "We therefore hold that the petition was insufficient to invoke the jurisdiction of the court under the declaratory judgments act." Gordon, 1964 OK 74 at § 10 391 P.2d 242.

§ 25 T.A.R. claims that Oklahoma City's allegation that the Development Agreements were lawful meant that there was not an actual case or controversy because the parties did not have opposing interests. This Court has not previously addressed this issue. The Supreme Court of Wyoming, however, did so in Brimmer v. Thomson, 521 P.2d 574 (Wyo.1974).

§ 26 In Brimmer, the Wyoming Attorney General brought a declaratory judgment action under that state's version of the Uniform Declaratory Judgment Act, which was substantially similar to the Oklahoma version of the Act. The Attorney General and some of the defendants, state senators who were

prospective candidates for governor, agreed that the defendants were eligible for the office of governor. The suit was brought because an earlier Attorney General's opinion had questioned the eligibility of the candidates. The Wyoming court held that the declaratory judgment action presented an actual case or controversy because the question created by the earlier Attorney General's opinion as to the eligibility of the candidates supplied the necessary adversity. The fact that the plaintiff and some of the defendants were in agreement did not change the determination that an actual case of controversy existed.

§ 27 To the same effect as Brimmer see State ex rel. Miller v. State Board of Education, 56 Idaho 210, 52 P.2d 141, 143 (1935). There the Idaho Supreme Court held that the public importance of the issue supported plaintiff's claim that there was an actual case or controversy despite the fact that there was no disagreement between the parties. In New Jersey Power & Light Company, 45 N.J. 237, 212 A.2d 136, 139 (1965) the court held that a declaratory judgment was valid, although both plaintiff and defendant believed the contract at issue to be valid.

§ 28 We agree with the analysis of the Wyoming, Idaho, and New Jersey courts. Applying the reasoning of their opinions here, we hold that the an actual case or controversy arose here as a result of the threat created by T.A.R.'s claims that the Development Agreements were fraudulent or otherwise unlawful. This conclusion is not altered by the fact that the parties to the declaratory judgment action all believed the Agreements to be valid. Thus, a justiciable case or controversy was presented to the trial court for resolution. When Oklahoma City filed its declaratory judgment action, it placed in issue T.A.R.'s contentions for resolution by an unbiased court. T.A.R. was entitled to no more.

§ 29 T.A.R. does not claim that Oklahoma City's suit against Bricktown Parking Investors and TMK/Hogan was collusive or fictitious. In any event, the record would not support

such a conclusion. The allegations by all parties that the Agreements were lawful did not deprive Oklahoma City's action of its justiciable character. The agreement among Oklahoma City and the other parties as to how the issues should be resolved was appropriate. Those issues were legitimate, not feigned or collusive. The burden was on T.A.R. to prove that the matter was non-justiciable and it did not do so. Application of Goodwin, 1979 OK 106 § 4, 597 P.2d 762.

§ 30 In Goodwin we held that, in the absence of a showing of fraud or collusion, the appeal of a suit between parties who were in agreement concerning the issues was justiciable despite the fact that the appellee failed to file an answer brief. The trial court heard T.A.R.'s arguments and read the depositions of its members before ruling on T.A.R.'s motion to intervene. This fact and the Goodwin opinion demonstrate that the ***908** trial court's order denying Tal's motion to intervene did not deprive Oklahoma City's action of its justiciable character.

CONCLUSION

§ 31 T.A.R. was not entitled to intervene in Oklahoma City's declaratory judgment action because Oklahoma City was representing the rights of all its taxpayers and was entitled to the presumption that it would do so in good faith. T.A.R. failed to overcome this presumption. Further, T.A.R. made no claim and the record would not support that Oklahoma City's suit was collusive or fictitious. Thus, the trial court did not err in denying both T.A.R.'s motion to intervene and its motion for continuance.

JUDGMENT OF THE TRIAL COURT AFFIRMED

HARGRAVE, V.C.J., and HODGES, LAVENDER, OPALA, and KAUGER, JJ., concur.

SUMMERS, C.J., concurs in result.

END OF DOCUMENT

2. Oklahoma Supreme Court Opinion - *State ex rel Tal v. Norick*, 1999 OK 85, 991 P.2d 999 - Decided: October 26, 1999, Mandate Issued: November 30, 1999 (a/k/a/ *Tal II*).

Tal v. Norick

No. 93,273
991 P.2d 999, 1999 OK 85
Decided: October 26, 1999
Mandate Issued: November 30, 1999

SUPREME COURT OF THE STATE OF OKLAHOMA

The STATE of Oklahoma, ex rel., Moshe TAL, resident taxpayer of The City of Oklahoma City; and Taxpayers Against Ripoffs ("T.A.R."), an initial association of thirteen resident taxpayers of the City of Oklahoma City, Oklahoma,

Plaintiffs-Appellants,

v.

Ron NORICK, in his official capacity as former Mayor of the City of Oklahoma City and as the former Chairman of the Oklahoma City Public Works Authority; Kirk Humphreys, in his capacity as Mayor of the City of Oklahoma City, and as the Chairman of the Oklahoma City Public Property Authority; Mark Schwartz, Frosty Peak, Jack Cornett, Frances Lowrey, Jerry W. Foshee, Ann Simank, Willa Johnson and Guy Liebman, in their official capacities as the City council of The City of Oklahoma City, Oklahoma, and as the Board of Trustees of the Oklahoma City Public Works Authority; The City of Oklahoma City, Oklahoma, a municipal corporation; the Oklahoma City Public Property Authority, a public trust, with The City of Oklahoma City, Oklahoma, as its sole beneficiary; The Oklahoma City Athletic Club, Inc., an Oklahoma corporation, general partner of the Oklahoma City Athletic Club limited partnership; and John Does No. 1-20,

Defendants-Appellees.

No. 93,273.

Oct. 26, 1999.

Taxpayers brought qui tam action alleging that transaction in which city leased baseball stadium it had built to minor league baseball team was invalid, because of inadequate consideration, and seeking money damages. The District Court, Oklahoma County, Niles Jackson, J., dismissed petition as premature. Taxpayers appealed. After granting motion seeking to have it retain appeal, the Supreme Court, Watt, J., held that qui tam action was premature, as action was pending in which city and its public property authority sought declaratory judgment that transaction was valid, or in the alternative return of property.

Affirmed.

Summers, C.J., concurred in the result.

West Headnotes

[1] **Abatement and Revival** ⇦**4**

2k4 Most Cited Cases

A defendant may by motion interpose the pendency of other litigation as an impediment to going forward with the action then sought to be prosecuted. 12 Okl.St.Ann. § 2012, subd. B, par. 8.

[2] **Abatement and Revival** ⇦**5**

2k5 Most Cited Cases

Qui tam action in which taxpayers alleged that transaction in which city leased baseball stadium to minor league baseball team was invalid because of inadequate consideration, and sought money damages, was premature, where action in which city and its public property authority sought declaratory judgment that transaction was valid, or in the alternative return

of property, was pending; city was representing rights of all taxpayers in declaratory judgment action, and was entitled to presumption that it would do so in good faith.

***999** Appeal from the District Court of Oklahoma County, Oklahoma; Honorable Niles Jackson District Judge.

§ 0 The trial court dismissed the second amended petition of Appellants Moshe Tal, et al., who denominate themselves as "an association known as Taxpayers Against Ripoffs ('T.A.R.')" and who sued on relation of the State of Oklahoma in a *qui tam* action. We hold that the trial court correctly dismissed Appellants' second amended petition.

TRIAL COURT'S ORDER OF DISMISSAL AFFIRMED

Bryce S. Kennedy, Jr., Kennedy & Associates, Enid, Oklahoma, for Appellants.

William O. West, Municipal Counselor, and Daniel T. Brummitt, Land Use Division Head, Richard C. Smith, Litigation Division Head, Attorneys for The City of Oklahoma City, and Diane Lewis, Deputy Municipal ***1000** Counselor, City of Oklahoma City, for Appellee, Oklahoma City Public Property Authority.

Melvin R. McVay, Jr., Heather L. Hintz, Phillips, McFall McCaffrey, McVay & Murrah, Oklahoma City, Oklahoma, for Appellee, Oklahoma City Athletic Club.

OPINION

WATT, Justice,

§ 1 Appellants, Tal and the association calling itself "T.A.R.," dismissed most of the defendants named in the style of this appeal. The only remaining defendants, appellees here, are the former Mayor of Oklahoma City, Ron Norick, in his official capacity, The City of Oklahoma City, the Oklahoma City Public Property Authority, and the Oklahoma City Athletic Club. The trial court granted the motions to dismiss of the remaining defendants, the City and its former Mayor, the Public Property

Authority, and the Athletic Club. Tal and T.A.R. appeal. Appellees moved that this Court retain this appeal on July 19, 1999 and we granted the motion on August 9, 1999.

FACTS AND PROCEDURAL BACKGROUND

§ 2 In 1993 the people of The City of Oklahoma City approved a special purpose sales tax to be used to construct improvements under the Oklahoma City Metropolitan Area Projects program, known as MAPS. Among those improvements was the Bricktown Ballpark. In 1996 Oklahoma City contracted with Boldt Construction Co. to build the Bricktown Ballpark. Oklahoma City leased the Bricktown Ballpark to the Oklahoma City Public Property Authority in 1997, which then subleased it to the Oklahoma City Athletic Club Limited Partnership. Under the sublease, the Athletic Club was to operate the Bricktown Ballpark for a period of ten years to be followed by three automatic five year renewals. The Public Property Authority and the Athletic Club amended the sublease in 1998 so that the Athletic Club could operate the Bricktown Ballpark for the 1998 season as a home for its AAA Minor League baseball team, the RedHawks, because certain conditions precedent to the original sublease becoming effective had not been satisfied but the parties wanted the team to use the park during the 1998 season despite the failure to satisfy these conditions precedent.

§ 3 A group headed by Tal "submitted numerous proposals to the City, Authority and their Officers to develop Bricktown property ..." Plaintiffs' Second Amended Petition. These proposals were rejected in favor of proposals by competing bidders.

§ 4 On September 9, 1998, following the City Counsel's rejection of the Tal group's proposals, Tal and T.A.R. filed a written demand under 62 O.S.1991 §§ 372 and 373, the qui tam statutes, demanding that Oklahoma City and the Public Property Authority rescind its contracts concerning the Bricktown Ballpark. T.A.R. claimed that the entire Bricktown

Ballpark transaction was void because of inadequate consideration. Tal and T.A.R. filed a qui tam action against Oklahoma City and the Public Property Authority in which they claimed that the Ballpark transaction was invalid and claimed a right to money damages from the City.

§ 5 In response to Tal's and T.A.R.'s written demand Oklahoma City and the Public Property Authority brought a declaratory judgment action against the Athletic Club on October 16, 1998. They sought a judgment declaring that the Bricktown Ballpark transaction was valid or, in the alternative, sought the return of the property if the transaction were found not to be valid. The Athletic Club filed its answer on November 10, 1998 in which it also alleged that the transaction was valid. Tal and T.A.R. twice amended their petition after Oklahoma City and the Public Property Authority had filed their action against the Athletic Club.

[1] § 6 Oklahoma City and the Public Property Authority moved to dismiss Tal's and T.A.R.'s second amended petition because Oklahoma City and the Public Property Authority had filed suit for declaratory judgment against the Athletic Club in response to Tal's and T.A.R.'s written demand. Tal and T.A.R. resisted the motion to dismiss on the ground that Oklahoma City's and the ***1001** Public Property Authority's action against the Athletic Club did not present a justiciable controversy because all parties to that action agreed that the transaction was valid. Tal and T.A.R. argued that the declaratory judgment action did not, therefore, serve to satisfy their written demand. Tal and T.A.R. also argued that the City's, and the Public Property Authority's contention that the transaction was valid showed that the City and the Public Property Authority could not be relied upon to prosecute the matter fairly and that Tal and T.A.R. should, therefore, be allowed to do so in their qui tam action. The trial court dismissed Tal and T.A.R.'s action on the ground that the issues raised by Tal and T.A.R. were under consideration by the court in the City's and the Public Property Authority's declaratory judgment action. A

defendant may by motion interpose the pendency of other litigation as an impediment to going forward with the action then sought to be prosecuted. See 12 O.S.1991 § 2012(B)8; Burks v. American Nat. Bank of Tulsa, 89 Okl. 62, 213 P. 301 (1923).

ISSUE

§ 7 Did the trial court correctly dismiss Tal's and T.A.R.'s qui tam action as having been prematurely brought?

We answer the question "yes."

DISCUSSION

[2] § 8 We addressed and disposed of issues substantially similar to those presented here in an earlier appeal involving Tal and another Bricktown project, City of Oklahoma City v. Oklahoma City Urban Renewal Authority, 1999 OK 71, 988 P.2d 901 (reh. den. September 30, 1999), Tal I. In Tal I, Tal and T.A.R. filed a written demand against the City, claiming that certain development agreements, other than those at issue here, were unlawful. The City then filed a declaratory judgment action against the other parties to the agreement in response to Tal's and T.A.R.'s demand. Both the City and the other parties to the agreements agreed in Tal I that those agreements were lawful. Although Tal and T.A.R. sought to intervene in the City's action in Tal I and did not prosecute an independent qui tam action, as they have done here, the plaintiffs' theories in support of intervention in Tal I were substantially similar to those presented by plaintiffs here in support of their claimed right to prosecute a *qui tam* action.

§ 9 In Tal I we held:

> T.A.R. was not entitled to intervene in Oklahoma City's declaratory judgment action because Oklahoma City was representing the rights of all its taxpayers and was entitled to the presumption that it would do so in good faith. T.A.R. failed to overcome this presumption. Further, T.A.R. made no claim and the record would not support that Oklahoma

City's suit was collusive or fictitious.

Tal I, 1999 OK 71 at § 31. The arguments Tal and T.A.R. make here were fully discussed and disposed of in Tal I. The similarity between the record presented here and the record we considered in Tal I convinces us that there is no reason to restate here our reasoning in Tal I. We therefore hold that the trial court did not err in concluding that the qui tam action was prematurely brought.

TRIAL COURT'S ORDER OF DISMISSAL AFFIRMED

HARGRAVE, V.C.J., HODGES, LAVENDER, OPALA, and KAUGER, JJ.-- concur.

SUMMERS, C.J.--concurs in result.

END OF DOCUMENT

3. Order denying Intervention - *City of Oklahoma City v. Urban Renewal Authority, et al*, District Court of Oklahoma County, Oklahoma - CJ-99-487-67, Dated 3/12/99.

IN THE DISTRICT COURT OF OKLAHOMA COUNTY

STATE OF OKLAHOMA

THE CITY OF OKLAHOMA CITY, a municipal corporation,	)
Plaintiff,	)
vs.	)Case No. CJ-99-487-67
THE OKLAHOMA CITY URBAN RENEWAL AUTHORITY, a public body corporate; BRICKTOWN PARKING INVESTORS, L.L.C., an Oklahoma limited liability company; and, BRICKTOWN TMK/HOGAN ENTERTAINMENT, L.L.C., an Oklahoma limited Liability Company,	)
Defendants.	)

ORDER

NOW on this 1st day of March, 1999, the Motion to Intervene (with attached qui tam petition under 62 O.S. 373) and Motion for Continuance (of the trial of this action for declaratory judgment and counterclaims for preliminary and permanent injunctive relief) of Moshe Tal, Lisa (Michelle) Bowers, Dr. John Migliaccio, Steve Migliaccio, Joy Parker, Physilla (Jo) Polley, Edna (Ennise) Richardson, Morning-Star Takapu, and Michael (Lawrence) Toms, came on for hearing before the

undersigned Judge. Movants were present by and through their counsel Bryce S. Kennedy; Plaintiff, The City of Oklahoma City, was present by and through its counsel Daniel T. Brummitt; Defendant, The Oklahoma City Urban Renewal Authority, was present by and through its counsel Dan Batchelor and Janis S. Powers, of the law firm of Batchelor & Powers, P.C.; and Defendants, Bricktown Parking Investors, L.L.C., and Bricktown TMK/Hogan Entertainment, L.L.C., were present by and through their counsel Melvin R. McVay, Jr., Robert N. Sheets, and Ellen K. Spiropoulos of the law of Phillips McFall McCaffrey McVay & Murrah, P.C. The Court having reviewed the Motion and having heard the arguments of counsel, find that the Motion should be denied.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that the Motion to Intervene and Motion for Continuance are hereby DENIED.

DATED this 12 day of March, 1999.

S/ Judge Karl Gray

JUDGE OF THE DISTRICT COURT

[5 PAGES OF PARTIES SIGNATURES OMITTED]

III. RULE 14 1(h)(i)(iii): Order Denying Rehearing:

Order, *State of Oklahoma v. City of Oklahoma City*, Oklahoma Supreme Court Appeal - Case No. 94,874 (*Tal III*) dated 2/5/01.

IN THE SUPREME COURT OF THE STATE OF OKLAHOMA

THE STATE OF OKLAHOMA, ex rel., Moshe Tal, resident taxpayer of The City of Oklahoma City; and Taxpayers Against Ripoffs ("T.A.R."), an association of more than ten resident taxpayers of the City of Oklahoma City, Oklahoma,	)	
Plaintiffs/Appellees,	)	
v.	)	No. 94,874
THE CITY OF OKLAHOMA CITY, OKLAHOMA, a municipal corporation; RONALD J. NORICK, in his personal and official capacity as the former Mayor of the City; KIRK D. HUMPHREYS, in his personal and official capacity as the Mayor of the City; JAMES E. THOMPSON, in his personal and official capacity as Assistant City Manager & former MAPS Director; WILLIAM O. WEST, in his personal and official capacity as City"s" Assistant Municipal Counselor; DANIEL T. BRUMMITT, In his personal and official capacity as City"s Assistant Municipal Counselor; THE OKLAHOMA CITY URBAN RENEWAL AUTHORITY, a public body corporate; TIANA P. DOUGLAS, in her personal and official capacity as the	)	

Executive Director of Urban Renewal;)
STANTON L. YOUNG, FRED JONES HALL,)
J. LARRY NICHOLS, WARREN)
GARDNER, and JAMES TOLBERT III, in his)
personal and official capacities as)
Commissioners of the Urban Renewal;)
WILLIAM (BILL) JOHNSTONE, in his)
personal and official capacity as the former)
Commissioner of Urban Renewal; DAN)
BATCHELOR, in his Personal and official)
capacity as legal counselor of Urban)
Renewal; BRICKTOWN INVESTORS, L.L.C.,)
an Oklahoma limited liability company;)
BRICKTOWN-TMK/HOGAN PARKING,)
L.L.C., an Oklahoma limited liability)
company; OKC ATHLETIC CLUB LIMITED)
PARTNERSHIP; BAP-BRICKTOWN, L.L.C.,)
an Oklahoma limited liability company;)
TMK/HOGAN ENTERTAINMENT, L.L.C., an)
Oklahoma limited liability company;)
TORCHMARK CORPORATION,(TMK), an)
Alabama corporation; TORCHMARK)
DEVELOPMENT CORPORATION, and TMK)
INCOME PROPERTIES, both subsidiaries of)
TMK; DAN RANDOLPH (RANDY) HOGAN;)
EDWARDS THEATRES CIRCUIT, INC., a)
California corporation; OKLAHOMA GAS &)
ELECTRIC COMPANY (OG&E), an)
Oklahoma corporation; THE BENHAM)
GROUP, an Oklahoma corporation; and)
JOHN DOES 1-50.)
)
Defendants/Appellees.)

ORDER

The Plaintiffs/Appellants' Petition for Rehearing, filed October 16, 2000, asking this Court to reconsider and modify

language used in is decision, *State ex rel, Moshe Tal v. The City of Oklahoma City*, 2000 OK 70, is denied.

Three groups of the Defendants/Appellees have filed motions for appeal-related attorney fees. On October 16, 2000, The City of Oklahoma City, Oklahoma, Ronald J. Norick, Kirk D. Humphreys, James E. Thompson, William O. West, and Daniel T. Brummitt filed their motion alleging that the subject action and appeal by the plaintiffs were brought in bad faith, and they were entitled to recover the reasonable costs of the defense of the action including attorney fees. On October 16, 2000, OKC Athletic Club Limited Partnership, Bricktown TMK/Hogan Entertainment, L.L.C., Bricktown Parking Investors, L.L.C., TMK/Hogan, Hogan Properties and Dan Randolph Hogan, filed their motion alleging that appellants' appeal was frivolous and asked for appeal-related attorney fees and costs. On October 17, 2000, Oklahoma City Urban Renewal Authority and Related Parties filed their motion for appeal-related attorney fees as sanctions against the plaintiffs for filing and prosecuting an appeal that is non-meritorious, frivolous, or a violation of Court rules. The Plaintiffs/Appellants responded with two separate briefs, both filed October 31, 2000, which deny the Defendants/Appellees are entitled to an award of attorney fees or sanctions. The motions of Defendants/Appellees for appeal- related attorney fees are denied.

S/Chief Justice

Chief Justice

ALL JUSTICES CONCUR.

IV. RULE 14 1(h)(i)(v): Relevant Law

1. Oklahoma Qui Tam statutes 62 Okla.Stat. §§ 372-373

62 Okla.Stat. § 372:

Every officer of the state and of any county, township, city, town or school district, who shall hereafter order or direct the payment of any money or transfer of any property belonging to the state or to such county, city, town or school district, in settlement of any claim known to such officers to be fraudulent or void, or in pursuance of any unauthorized, unlawful or fraudulent contract or agreement made or attempted to be made, for the state or any such county, city, town or school district, by any officer thereof, and every person, having notice of the facts, with whom such unauthorized, unlawful or fraudulent contract shall have been made, or to whom, or for whose benefit such money shall be paid or such transfer of property shall be made, shall be jointly and severally liable in damage to all innocent persons in any manner injured thereby, and shall be furthermore jointly and severally liable to the state, county, city, town or school district affected, for triple the amount of all such sums of money so paid, and triple the value of property so transferred, as a penalty, to be recovered at the suit of the proper officers of the state or such county, city, town or school district, or of any resident taxpayer thereof, as hereinafter provided. 62 Okla.Stat. § 372.

62 Okla.Stat. § 373:

Upon the refusal, failure, or neglect of the proper officers of the state or of any county, township, city, town, or school district, after written demand signed, verified and served upon them by ten resident taxpayers of the state or such county, township, city, town, or school district, to institute or diligently prosecute proper proceedings at law or in equity for the recovery of any money or property belonging to the state, or such county, township, city, town, or school district, paid out or transferred by any officer thereof in pursuance of any unauthorized, unlawful, fraudulent, or void contract made, or

attempted to be made, by any of its officers for the state or any such county, township, city, town, or school district, or for the penalty provided in the preceding section, any resident taxpayer of the state or such county, township, city, town, or school district affected by such payment or transfer after serving the notice aforesaid and after giving security for cost, may in the name of the State of Oklahoma as plaintiff, institute and maintain any proper action which the proper officers of the State, county, township, city, town, or school district might institute and maintain for the recovery of such property, or for said penalty; and such municipality shall in such event be made defendant, and one-half (½) the amount of money and one-half (½) the value of the property recovered in any action maintained at the expense of a resident taxpayer under this section, shall be paid to such resident taxpayer as a reward. 62 Okla.Stat. § 373.

2. Oklahoma Intervention statute 12 Okla.Stat. § 2024

Title 12 Okla.Stat. § 2024.
§§ 2024 . Intervention.

A. INTERVENTION OF RIGHT. Upon timely application anyone shall be permitted to intervene in an action:

1. When a statute confers an unconditional right to intervene; or

2. When the applicant claims an interest relating to the property or transaction which is the subject of the action and he is so situated that the disposition of the action may as a practical matter impair or impede his ability to protect that interest.

B. PERMISSIVE INTERVENTION. Upon timely application anyone may be permitted to intervene in an action:

1. When a statute confers a conditional right to intervene; or

2. When an applicant's claim or defense and the main action have a question of law or fact in common. When a party to an action relies for ground of claim or defense upon any statute or executive order administered by a federal or state governmental officer or agency or upon any regulation, order, requirement or agreement issued or made pursuant to the statute or executive order, the officer or agency upon timely application may be permitted to intervene in the action. In exercising its discretion the court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties.

C. PROCEDURE. A person desiring to intervene shall serve a motion to intervene upon the parties as provided in Section 5 of this act. The motion shall state the grounds therefor and shall be accompanied by a pleading setting forth the claim or defense for which intervention is sought. If the motion to intervene is granted, the plaintiff or defendant, or both, may respond to the pleading of the intervenor within twenty (20) days after the date that the motion was granted unless the court prescribes a shorter time.

D. INTERVENTION BY STATE OF OKLAHOMA. In any action, suit, or proceeding to which the State of Oklahoma or any agency, officer, or employee thereof is not a party, wherein the constitutionality of any statute of Oklahoma affecting the public interest is drawn in question, the court shall certify such fact to the Attorney General of Oklahoma, and shall permit the State of Oklahoma to intervene for presentation of evidence, if evidence is otherwise admissible in the case, and for argument on the question of constitutionality. The State of Oklahoma shall, subject to the applicable provisions of law, have all the rights of a party and be subject to all liabilities of a party as to court costs to the extent necessary for a proper presentation of the facts and law relating to the question of constitutionality.

3. Federal Rules for Intervention - FRCP-Rule 24

Rule 24 - Intervention

(a) Intervention of Right. Upon timely application anyone shall be permitted to intervene in an action: (1) when a statute of the United States confers an unconditional right to intervene; or (2) when the applicant claims an interest relating to the property or transaction which is the subject of the action and the applicant is so situated that the disposition of the action may as a practical matter impair or impede the applicant's ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.

(b) Permissive Intervention. Upon timely application anyone may be permitted to intervene in an action: (1) when a statute of the United States confers a conditional right to intervene; or (2) when an applicant's claim or defense and the main action have a question of law or fact in common. When a party to an action relies for ground of claim or defense upon any statute or executive order administered by a federal or state governmental officer or agency or upon any regulation, order, requirement, or agreement issued or made pursuant to the statute or executive order, the officer or agency upon timely application may be permitted to intervene in the action. In exercising its discretion the court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties.

(c) Procedure. A person desiring to intervene shall serve a motion to intervene upon the parties as provided in Rule 5. The motion shall state the grounds therefor and shall be accompanied by a pleading setting forth the claim or defense for which intervention is sought. The same procedure shall be followed when a statute of the United States gives a right to intervene. When the constitutionality of an act of Congress affecting the public interest is drawn in question in any action in which the United States or an officer, agency, or employee thereof is not a party, the court shall notify the Attorney

General of the United States as provided in Title 28, U.S.C. § 2403. When the constitutionality of any statute of a State affecting the public interest is drawn in question in any action in which that State or any agency, officer, or employee thereof is not a party, the court shall notify the attorney general of the State as provided in Title 28, U.S.C. § 2403. A party challenging the constitutionality of legislation should call the attention of the court to its consequential duty, but failure to do so is not a waiver of any constitutional right otherwise timely asserted.

V. RULE 14 1(h)(i)(vi): Other Material Essential to Understand the Petition:

1. Taxpayers 3/1/99 Motion to Intervene:

IN THE DISTRICT COURT OF OKLAHOMA COUNTY
STATE OF OKLAHOMA

THE CITY OF OKLAHOMA CITY, a municipal corporation,	)
Plaintiff,	)
vs.	)Case No. CJ-99-487-67
THE OKLAHOMA CITY URBAN RENEWAL AUTHORITY, a public body corporate; BRICKTOWN PARKING INVESTORS, L.L.C., An Oklahoma Limited Liability Company; and, BRICKTOWN TMK/HOGAN ENTERTAINMENT, L.L.C., an Oklahoma Limited Liability Company,	)
Defendants.	)

MOTION TO INTERVENE AND MOTION FOR CONTINUANCE

Comes Now, Moshe Tal, Lisa (Michelle) Bowers, Dr. John Migliaccio, Steve Migliaccio, Joy Parker, Physilla (Jo) Polley, Edna (Ennise) Richardson, Morning-Star Takapu, and Michael (Lawrence) Toms, hereinafter referred to as Intervenors, pursuant to 12 O.S. Section 2024A and move for leave to intervene as a matter of right, or in the alternative, pursuant to 12 O.S. 2024B, permissive intervention, as additional defendants in this action, and show the court:

1. The Interveners are residents and taxpayers of the City of Oklahoma City, Oklahoma, and in addition have paid a special purpose sales tax over the past several years, specifically, Ordinance No. 20,045 (hereinafter "MAPS Ordinance"), the proceeds of which have been used to acquire land and construct public improvements in Bricktown.

2. The Plaintiff, the City of Oklahoma City (the "City"), is a charter city organized and existing under the laws of the State of Oklahoma.

3. The Defendants, the Oklahoma City Urban Renewal Authority (the "Authority") is a body corporate, created pursuant to 11 Okla. Stat. 1991, Section 38-101 et seq.

4. On June 24, 1997, the City approved an amended Urban Renewal Plan entitled "The MAPS Sport-Entertainment-Parking Support Redevelopment Plan" (hereinafter "Redevelopment Plan") for an area located in downtown Oklahoma City (hereinafter the "Plan Area").

5. On January 22 1998, the City conveyed certain real property acquired by the City for MAPS purposes (hereinafter the MAPS Property") within the Plan Area to the Authority for implementation of the Redevelopment Plan.

6. On December 19, 1997, the Authority and defendant, Bricktown Parking Investors, L.L.C. (Hereinafter "Bricktown Parking") entered into a Parking Redevelopment Agreement (hereinafter "Parking Agreement") for the generation and creation of parking facilities to be located on those parcels of real property located south of Reno Avenue, including the MAPS Property, and more particularly described in the Parking Agreement (hereinafter "Parking Facilities").

7. On February 4, 1998, the Authority and Bricktown

Parking entered into a Ground Lease (hereinafter the "Ground Lease") for the exclusive use and operation of the Parking Facilities for an initial term commencing on February 4, 1998, and capable of extending for the next thirty (30) years.

8. On July 21, 1998, the Authority and Bricktown TMK/Hogan Entertainment, L.L.C. (Hereinafter "Bricktown Entertainment") entered into a Redevelopment Agreement (hereinafter "Redevelopment Agreement") for the development of certain real property within the Plan Area, including the MAPS Property, to be used as entertainment facilities (hereinafter "Entertainment Facilities").

9. On January 12, 1999, the Intervenors prepared and served a "Written Demand" to the City Clerk, City Manager, Mayor and City Council of the City alleging that the Parking Agreement, the Ground Lease and the Redevelopment Agreement (hereinafter the "Agreements") constitute a transfer of property by the City and/or the Authority pursuant to an unlawful contract(s); i.e. the Agreements, in violation of state law and demanding that the City Council direct the Municipal Counselor to file a lawsuit in the name of the City to declare the Agreements void and unlawful and to recover the MAPS Property and any amounts owed to The City, by the Authority, Bricktown Parking and/or Bricktown Entertainment, attached hereto as Exhibit "A". The Authority was later served with the Written Demand.

10. On January 26, 1999, the City filed this Petition for Declaratory Judgement against the named Defendants asking this Honorable Court to confirm the validity of the Agreements, or in the alternative, declare that this Honorable Court declare the Agreements as not valid as a wrongful transfer of the MAPS Property and therefore are null and void and permit the City to recover an and

all MAPS Property and other monies wrongfully transferred.

11. On February 22 and 23, 1999, one of the defendants herein, commenced the depositions of the Intervenors, pursuant to subpoena duly served. Moshe Tal, one of the Intervenors was present for all the depositions, and the Intervenors legal counsel was present on February 22, 1999. At no time did the Plaintiff or Defendants inform Moshe Tal or his counsel of that this case was set for trial on March 1 and 2, 1999, nor did legal counsel for the Intervenors receive any correspondence or telephone calls regarding same, although the rules of Professional Ethics and common courtesy may dictate the provision of such notice.

12. Moshe Tal, the Intevenor who helped prepare the Written Demand and has prepared most of the research and compiled the documentation with regard to the subject of this matter, scheduled for many weeks a trip tp and is currently in Puerto Rico, beginning on February 26, 1999, and through March 5, 1999. Moshe Tal is the Intervenors main witness in this case and it is expected that none of the other Intervenors will testify in this matter.

13. Article 10 Section 14 and Article 10 Section 17 of the Oklahoma Constitution require that public money must be spent for public purposes and that a city or an authority can not give a gift or lend their credit to any person, firm or corporation. Among other allegations, the Written Demand alleges that the City/Authority, in entering into the Agreements violated these constitutional provisions by: (1) providing Bricktown Parking with 20 acres of prime parking for theoretically price of one annual parking space; (2) by selling prime property to Bricktown Entertainment for significantly less that its purchase price; (3) by requiring little additional consideration, accountability and safeguards

to otherwise protect the interests of the taxpayers. The Intervenors represent all taxpayers with similar interests and points of view and without the participation of Intervenors in this proceeding, the interests of the public will not be heard nor their arguments made. In essence, Intervenors Motion to Intervene should be granted since:

a. The Intervenors have an interest relating to the alleged Wrongful Transfer, the subject of this action;

b. Without Intervention the disposition of this action, as a practical matter, impairs, impedes and may eliminate the Interveners' protection of the public interests;

c. The Interveners interest is not represented by other parties since they are signatories of the Agreements.

If the Interveners are denied a judicial hearing, then these Interveners, as well as thousands of like-minded residents of the City of Oklahoma City will be denied a meaningful opportunity to be heard. The parties to this action want to stop our right to talk; and that right is as fundamental as our democracy.

14. Interveners would request a continuance to permit the Interveners to properly prepare and defend the rights of the taxpayers of the City of Oklahoma City.

15. A Brief of Authorities in Support of this Motion is filed herein concurrently.

16. A Petition is attached as Exhibit "B" to this Motion setting out the claims for which intervention is sought.

Dated this 1st day of March, 1999.

Respectfully Submitted,

s/Bryce Kennedy

Bryce S. Kennedy OBA #4959

Kennedy & Associates
1 Grand Center
Mezzanine Suite
Enid, Oklahoma 73701
Voice: (580) 233-9707

[CERTIFICATE OF HAND DELIVERY OMITTED]

2. Exhibit "C" to Taxpayers' 4/5/99 Petition In Error - Oklahoma Supreme Court - Appeal Case No. 92874, Opinion: *City of Oklahoma City v. Urban Renewal Authority, et al*, 1999 OK 71, 988 P.2d 901.

EXHIBIT "C"

ISSUES AND ERROR PROPOSED TO BE RAISED ON APPEAL

The trial court should have granted Interveners/Appellants a continuance and permitted intervention in the declaratory judgement litigation for the following reasons:

1. Failure to grant a short continuance due to the short notice and unavailability of the main resident taxpayer and witness, and to permit intervention, constituted an abuse of discretion, was unreasonable and deprived the interveners of due process.

2. Without the Interveners participation in the declaratory judgment case, the "opposing interests" requirement is not present, since the parties are in full agreement and/or there is no actual, existing justiciable controversy between the parties.

3. The appellants have an interest in the subject matter of the litigation, including but not limited to the following reasons: to prevent collateral attacks, consent judgements, res judicata, collateral estoppel and other issue preclusion defenses both to the petition attached to the Motion to Intervene and other accrued causes of actions of appellant(s).

4. The appellants have a right to intervene, and should have been permitted to intervene, as authorized by 12 O.S. Section 2024(A)(2).

5. The Illegal Agreements constitute a wrongful transfer of property and payment of money pursuant to an illegal

contract(s) in violation of Article 10 Section 14 and 17 of the Oklahoma Constitution, and thereby fail to provide adequate consideration, safeguard and accountability as required pursuant to the landmark cases of Burkhardt v. The City of Enid, 771 P.2d 608, and the State of Oklahoma ex rel. William Daniel Brown, et al. The City of Warr Acres, et al., 1997 OK 117.

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3. Excerpts from Trial Transcript -held March 1, 1999, District Court of Oklahoma County, Oklahoma - *City of Oklahoma City v. Urban Renewal Authority, et al*, Case No. CJ-99-487.

IN THE DISTRICT COURT OF OKLAHOMA COUNTY

STATE OF OKLAHOMA

THE CITY OF OKLAHOMA CITY, a municipal corporation,	)
Plaintiff,	)
vs.	)Case No. CJ-99-487
THE OKLAHOMA CITY URBAN RENEWAL AUTHORITY, a public body corporate; BRICKTOWN PARKING INVESTORS, L.L.C., An Oklahoma Limited Liability Company; and, BRICKTOWN TMK/HOGAN ENTERTAINMENT, L.L.C., an Oklahoma Limited Liability Company,	)
Defendants.	)

TRANSCRIPT OF BENCH TRIAL

HAD ON THE 1ST DAY OF MARCH, 1999

BEFORE THE HONORABLE KARL GRAY DISTRICT JUDGE
IN AND FOR OKLAHOMA COUNTY OKLAHOMA

REPORTED BY:

Marla Hill, CSR, RPR
Official Court Reporter
Oklahoma County Courthouse
Oklahoma City, Oklahoma 73102

000532

* * *

Excerpt from page 31, lines 18-36 (Interveners' attorney, Bryce Kennedy, arguing Taxpayers right to intervene):

> " ... I have – I set out in my motion what I think the standard is for a motion to intervene. The interveners have an interest relating to the alleged wrongful transfer of the subject disaction[sic]. And we do, as do all the residents of Oklahoma City. Without intervention the disposition of this action is a practical matter and impairs and impeded and may eliminate the interveners' protection of the public interest. " In Brackets Added.
>
> *Id.*, 3/1/99 Trial Transcript, p. 31.

* * *

Insert from page 70, lines 1-6 (Court overrules Taxpayers' Motion to Intervene and Motion for Continuance):

> "THE COURT: Anything else"
>
> MR BRUMMITT [CITY'S COUNSEL]: No, your Honor.
>
> THE COURT: Overruled. Exception.
>
> (Mr. Kennedy exited the courtroom.)
>
> THE COURT: I need to take another recess. Five minutes." In Brackets Added.
>
> *Id.*, 3/1/99 Trial Transcript, p. 70.

END OF APPENDIX

Dated: May 7, 2001

MaryGaye LeBoeuf
6704 Parkwood Lane
Oklahoma City, Oklahoma 73132
Telephone: (405)728-9925
Counsel for Petitioners

Supreme Court, U.S.
FILED
JUN 7 2001
CLERK

No. 00-1685

In The

Supreme Court of the United States

THE STATE OF OKLAHOMA, ex rel., Moshe Tal, and Taxpayers Against Ripoffs ("T.A.R."), an association of more than ten resident taxpayers of the City of Oklahoma City, Oklahoma,

Petitioners,

v.

THE CITY OF OKLAHOMA CITY, OKLAHOMA, et al.,

Respondents.

On Petition For Writ Of Certiorari To The Supreme Court Of Oklahoma

RESPONDENT TORCHMARK CORPORATION'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Can the State deny a taxpayer the right to relitigate a previously decided *qui tam* action which, by state law, can only be brought by the taxpayer if the appropriate government official, after a proper taxpayer's demand, refuses to institute or diligently prosecute the matter, on the basis that in the previous action pertaining to the taxpayer's demand, the court has already determined by a denial of the taxpayer's motion to intervene in that action the appropriate government official was adequately representing taxpayers' common interest and, thus, the taxpayer had no standing to pursue the *qui tam* action?

CORPORATE DISCLOSURE STATEMENT

Respondent Torchmark Corporation, an Alabama corporation, is the parent corporation of several other entities, and there is no other publicly held company owning 10% or more of Torchmark's stock.

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STATEMENT OF THE CASE

This action concerns complaints made by taxpayers led by Moshe Tal[1] concerning public funds being used for redevelopment of the Bricktown area under the Oklahoma City Metropolitan Area Projects program, known as "MAPS". As a result of Moshe Tal's allegations, three separate lawsuits have been filed in Oklahoma state courts.[2]

Under Oklahoma's *qui tam* statute,[3] Moshe Tal, on September 9, 1998, filed a written demand requesting Oklahoma City to institute the appropriate legal action to have the contract concerning the Bricktown Ball Park declared invalid and to recover all funds paid under the contract. Before the appropriate government official could respond to the written demand, Moshe Tal filed a *qui tam* action seeking to have the Bricktown Ball Park transaction declared void and to recover the funds paid under the contract. Thereafter, on October 16, 1998, Oklahoma City filed a declaratory judgment action in state court seeking to determine the validity of the Bricktown

---

[1] Moshe Tal had previously participated in submitting proposals to develop certain Bricktown property, but those proposals were not accepted and competing bidders, including some of the respondents, were awarded the contracts. *See* Opinion in *Tal II*, App. to Petition, p. 35. Petitioners will be hereinafter referred to as "Moshe Tal".

[2] Those three (3) lawsuits have resulted in three (3) separate appeals to the Oklahoma Supreme Court and those appeals have been commonly referred to as *Tal I*, *Tal II*, and *Tal III*. *See* App. to Petition, pp. 1-43.

[3] Okla. Stat. tit. 62, §§372-373. *See* App. to Petition, pp. 44-45.

Ball Park transaction. Opinion, App. to Petition, pp. 32-38.

The trial court, on May 26, 1999, dismissed the *qui tam* action brought by Moshe Tal on the basis that it was premature under Oklahoma's *qui tam* statute because the appropriate government authority was pursuing the action. Moshe Tal appealed that dismissal to the Oklahoma Supreme Court (referred to as *Tal II*). Opinion, App. to Petition, pp. 32-38.

While *Tal II* was pending in the trial court, Moshe Tal filed another demand with Oklahoma City on September 12, 1999, contesting other redevelopment contracts concerning Bricktown redevelopment entered into under the MAPS program. In response to this demand, the City on January 16, 1999, filed a declaratory judgment action requesting the court to determine the validity of those contracts questioned by Moshe Tal in the written demand. Prior to a trial of the matter, Moshe Tal sought to intervene in the action on the ground that the taxpayers' interest was not being adequately represented by the City. The trial court denied the motion to intervene and that denial was appealed to the Oklahoma Supreme Court by Moshe Tal (referred to as *Tal I*).[4] Opinion, App. to Petition, pp. 17-31.

On September 1, 1999, the Oklahoma Supreme Court affirmed in *Tal I* the trial court's denial of Moshe Tal's motion to intervene. The Oklahoma Supreme Court affirmed the ruling on the basis that Moshe Tal had not

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[4] The trial court later ruled that the contracts were valid. Opinion, App. to Petition, p. 24.

overcome the presumption that Oklahoma City was adequately representing the rights of all taxpayers. Opinion, App. to Petition, pp. 17-31. Thereafter, on October 26, 1999, the Oklahoma Supreme Court in *Tal II* affirmed the dismissal of the *qui tam* action brought by Moshe Tal. The court held that its ruling in *Tal I* adequately disposed of the arguments in *Tal II* and that the trial court correctly ruled the *qui tam* action was prematurely brought. Opinion, App. to Petition, pp. 32-38.

On March 15, 2000, Moshe Tal filed another *qui tam* action based on the written demand he had filed with the City on September 12, 1999. In that action, Moshe Tal claimed that despite the ruling by the Oklahoma Supreme Court in *Tal I*, taxpayers had not been adequately represented in the declaratory judgment action brought by the City and that they were entitled to bring this action to have the contracts declared invalid and to recover as a reward part of the monies illegally obtained through the contracts. The defendants moved to dismiss the action on several grounds, including the legal premise that the issue of Moshe Tal's standing to bring this action was decided in *Tal I*.[5] The trial court granted defendants'

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[5] Torchmark filed a separate motion for summary judgment on issues raised by other defendants in motions to dismiss. Torchmark's motion was disposed of and Torchmark was granted judgment by the journal entry of judgment entered by the trial court on May 23, 2000. Journal Entry of Judgment, App. to Petition, pp. 14-16. Another issue raised by the defendants and accepted by the trial court was that Moshe Tal's action was untimely because it was not brought within six (6) months of the written demand. Record Docs. Nos. 1-8.

motions and Moshe Tal appealed (referred to as *Tal III*). Opinion, App. to Petition, pp. 1-13.

On September 26, 2000, the Oklahoma Supreme Court in *Tal III* affirmed the dismissal of the *qui tam* action brought by Moshe Tal. The Oklahoma Supreme Court affirmed the trial court on the basis that Moshe Tal lacked standing to prosecute the action because, as found by the court in *Tal I*, Moshe Tal had failed to make a showing that the City was not adequately representing taxpayers' interest.[6] Moshe Tal filed for rehearing and the Oklahoma Supreme Court denied the petition for rehearing on February 5, 2001. Opinion, App. to Petition, pp. 1-13.

From that denial of rehearing, Moshe Tal has filed a petition for writ of certiorari in this Court.

REASON FOR DENYING THE WRIT

Moshe Tal's petition for a writ of certiorari should be denied simply for the reason that Moshe Tal, despite his contentions to the contrary, has not shown that the Oklahoma Supreme Court has decided a matter involving a federal question not settled by this Court or has decided an important federal question in such a way that conflicts with applicable decisions of this Court. Moshe Tal's petition is nothing more than an attempt under the guise of a

[6] The Oklahoma Supreme Court also held in *Tal III* that Moshe Tal had violated the court rules by failing to divulge in the petition in error in the appeal the relationship among *Tal I*, *Tal II* and *Tal III*. Opinion, App. to Petition, pp. 8-9.

due process argument to have this Court interpret state statutes and reevaluate the state court's factual finding concerning the adequacy of the government's representation of taxpayers in a state *qui tam* action. This Court does not intervene to interpret state law or to review factual findings by a state court.

As shown by the facts in this matter, two separate *qui tam* actions concerning Bricktown projects have been prosecuted by government officials as a result of Moshe Tal's demands. On three separate occasions – *Tal I* by a motion to intervene, *Tal II* by a premature *qui tam* action, and *Tal III*, an after-the-fact *qui tam* action – Moshe Tal has attempted to litigate the matter himself in an attempt to collect a reward. Under Oklahoma's *qui tam* statute, a taxpayer only has standing to prosecute an alleged illegal use of public funds if, after appropriate demand, the appropriate government official refuses to institute or diligently prosecute proper proceedings. Okla. Stat. tit. 62, §373. In this case, the government has not only pursued the action, which by statute prohibits Moshe Tal from bringing an individual action on behalf of the State, but also he has been afforded the opportunity to contest the adequacy of the government's representation on behalf of taxpayers in those actions.

This case does not present a situation where an individual's own personal interest is at stake and the court is attempting to hold that individual bound by a decision in which he did not participate. As announced by the Supreme Court in *Hansberry v. Lee*, 311 U.S. 31 (1940), where an individual's own personal interest is at stake, one cannot be bound by a decision in a process where he was absent unless he is a member of a class whose

interests are so common that his interest has been adequately represented by another in the previous proceedings. Despite Moshe Tal's contentions to the contrary, the Court in *Hansberry* did not hold that where a claim is of a representative nature that a prior decision will not be binding on all on behalf of whom the action was brought. In *Hansberry*, the Court found that the interests of those in the first proceeding were different from those in the second proceeding and thus the first proceeding did not bar relitigation of the individual interests of those in the second proceeding *Id.*

Here, Moshe Tal, who does not have standing under state law to litigate unless government officials are not properly prosecuting the action, has had the opportunity to litigate the issue of whether government officials were adequately representing the interests of all taxpayers. He is not an absent member who has not been given the opportunity to contest the representation of the taxpayers at large. The fact that he chose to contest the adequacy of the representation of taxpayers' interest through a motion to intervene in *Tal I* and that he disagrees with the decision reached by the state courts in denying his motion to intervene[7] in *Tal I* and with the decision by the state

---

[7] Moshe Tal's argument that the federal intervention rule has been amended to eliminate "the bound by" requirement and, therefore, the ruling on his motion to intervene did not decide the issue of whether he is bound by that ruling in later proceedings is totally irrelevant. Moshe Tal's right to intervene is governed by state law – that being, his right to intervene under Oklahoma's intervention and *qui tam* statutes. Okla. Stat. tit. 12, §2024; Okla. Stat. tit. 62, §§372-373. Under Oklahoma law, a party may seek intervention as a matter of right only when a

courts that he cannot relitigate that issue in a later proceeding does not violate due process under the rule announced in *Hansberry* so as to entitle him to relitigate the issue in a later proceeding.

More importantly, the question presented by Moshe Tal was answered by this Court in *Richards v. Jefferson County, Ala.*, 517 U.S. 793 (1996). In *Richards*, this Court addressed the issue under what circumstances state courts were free to apply the doctrine of *res judicata* to taxpayer cases. The Court identified two categories of taxpayers' actions. The Court stated:

> Our answer requires us to distinguish between two types of actions brought by taxpayers. In one category are cases in which the taxpayer is using that status to entitle him to

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statute confers such an unconditional right or when the applicant claims an individual interest which as a practical matter the disposition of the action may impair his ability to protect that interest and may seek permissive intervention at the discretion of the trial court only when a statute confers an unconditional right or when the applicant's claim and the main action have a common question of law or fact. Okla. Stat. tit. 12, §2024. As held by the Oklahoma Supreme Court, Moshe Tal's right to seek intervention was permissive at best. Opinion, App. to Petition, pp. 26-27. Through his motion to intervene, he chose at that time to litigate the adequacy of the government's representation. The trial court ruled that he had not made a sufficient factual showing to be entitled to intervene to prosecute the action and that ruling was affirmed by the Oklahoma Supreme Court. He lost and he has no right to repeatedly litigate the issue.

> complain about an alleged misuse of public funds.
>
> * * *
>
> As to this category of cases, we may assume that the States have wide latitude to establish procedures not only to limit the number of judicial proceedings that may be entertained but also to determine whether to accord a taxpayer any standing at all.
>
> Because the guarantee of due process is not a mere form, however, there obviously exists another category of taxpayer cases in which the State may not deprive individual litigants of their own day in court. By virtue of presenting a federal constitutional challenge to a State's attempt to levy personal funds, petitioners clearly bring an action of this latter type.

Richards, 517 U.S. at 803 (citations omitted).

This case concerns the former category where a taxpayer is using that status to enable him to complain about misuse of government funds. As pointed out in *Richards*, this Court has held that States have wide latitude to limit the number of judicial proceedings and to determine whether a taxpayer should have standing at all. *Id.* The Oklahoma *qui tam* statute only gives standing to a taxpayer in situations that are involved in this action when the government does not adequately take action to protect the interests of the taxpayers at large. Okla. Stat. tit. 62, §373. In this case, the state courts have made the factual determination that the government entities were adequately representing the common interest of the taxpayers and that Moshe Tal had not made an adequate

showing that the government was not adequately representing the taxpayers when he moved to intervene in *Tal I*. Consequently, the state courts did have the right to refuse to allow Moshe Tal to bring *Tal III* on the basis that the ruling of the adequacy of the representation of the taxpayers in *Tal I* resolved the matter and Moshe Tal did not have standing to relitigate that matter.[8]

Moshe Tal's attempt to distinguish the *Richards* case with regard to the right of the State to limit judicial proceedings in category one taxpayer cases is disingenuous at best. *See* Moshe Tal's petition at pp. 13-14, n.5. In the footnote, Moshe Tal contends that "[t]he phrase 'diligently prosecute' shows the legislature's intent to allow a taxpayer action in situations where the government has already brought an action." *Id.* at p. 14, n.5. This argument highlights the essence of Moshe Tal's petition. He is requesting this Court to accept certiorari to interpret state law to determine when he himself can bring a *qui tam* action and how many times he can raise the same issue. He has not challenged the constitutionality, either facially or as applied, of the *qui tam* statute. Moshe Tal's due process rights have not been violated; he merely wants another chance to have another court reevaluate the adequacy of the government's representation. He does not have that right.

---

[8] As noted by the Oklahoma Supreme Court in *Tal III*, Moshe Tal did not make any showing – factually or legally – why he has standing to bring another *qui tam* action in face of the ruling by the Oklahoma Supreme Court in *Tal I*. Opinion, App. to Petition, p. 7.

This matter has been properly decided under state law and Moshe Tal has been afforded all the due process to which he is entitled. The Oklahoma Supreme Court's decision in *Tal III* is in accord with the *Hansberry* and *Richards* decisions of this Court. Moshe Tal's petition should be denied.

CONCLUSION

For the above reasons, Respondent Torchmark Corporation objects to Moshe Tal's petition for a writ of certiorari and requests this Court to deny the same.

Respectfully submitted,

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Supreme Court, U.S.
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JUN 7 2001
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No. 00-1685

In The
Supreme Court of the United States

THE STATE OF OKLAHOMA, ex rel.,
Moshe Tal, et al.,

Petitioners,

vs.

THE CITY OF OKLAHOMA CITY, OKLAHOMA,
et al.,

Respondents.

On Petition for Writ of Certiorari to the Oklahoma Supreme Court

---

BRIEF OF THE CITY OF OKLAHOMA CITY AND RELATED PARTIES IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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June 7, 2001

QUESTION PRESENTED

Whether the Oklahoma Supreme Court's application of Oklahoma Rules of issue preclusion and standing in relation to Oklahoma Statutes creating *Qui tam* actions somehow affected the Petitioners' due process rights and whether the Petitioners had a property right that would trigger individual due process requirements.

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OPINIONS BELOW

The opinion of the Oklahoma Supreme Court is reported at *State of Oklahoma, ex rel. Tal v. The City of Oklahoma City, et al.*, 2000 OK 70, 19 P.3d 268 (Okla. 2000) ("*Tal III*").

JURISDICTION

Petitioners seek to invoke this Court's jurisdiction by seeking a writ of certiorari from the Oklahoma Supreme Court's denial of their Petition for Rehearing. These Respondents, the City of Oklahoma City and Related Parties[1] agree that the ruling below is final for purposes of this Court's jurisdiction under 28 U.S.C. § 1257. However, Petitioners make a number of misstatements in their jurisdictional statement. Specifically, and most importantly, in the Petition for Rehearing which Petitioners filed seeking a reconsideration by the Oklahoma Supreme Court of its Opinion, Petitioners specifically stated that they were not "asking this Court to reconsider its decision affirming the trial court's dismissal of this action." (Petition for Rehearing, p. 2; Appendix, pp. 40-52). Petitioners only asked the Court to modify certain language of its Opinions and the Concurring Opinion. Having failed to raise the constitutional issue which they now attempt to present, Petitioners have waived such claim.

The Oklahoma Supreme Court's routine application of *res judicata* and issue preclusion to a peculiarly state law statutory claim does not raise a due process issue as Petitioners would suggest. There are independent state law grounds for the decision of the trial court below. The trial

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[1]The "Related Parties" are each either current or former elected or appointed officers or employees of the City of Oklahoma City. They are, specifically, Ronald J. Norick, Kirk D. Humphreys, James E. Thompson, William O. West and Daniel T. Brummitt.

court made no finding whatsoever as to the basis for its dismissal of the subject action. There were numerous other grounds raised in the Respondent's motion to dismiss the trial court action, including statute of limitations, standing and other issues. (*See*, Respondent's Motion to Dismiss of Defendant The City of Oklahoma City and Related Parties filed below on April 5, 2000, Appendix pp. 1-21; and Reply Brief of Defendants the City of Oklahoma City, Ronald J. Norick, Kirk D. Humphreys, James E. Thompson, William O. West and Daniel T. Brummitt in Support of Defendants' Motion to Dismiss, Appendix pp. 22-39).

For these reasons jurisdiction to review the subject action does not exist.

STATUTES INVOLVED

Oklahoma *Qui Tam* Statutes 62 Okla. Stat. §§ 372, 373. (Petitioners'Appendix at pp. 44 to 45.)

Oklahoma intervention statutes 12 Okla. Stat. § 2024(a)(2). (Petitioners' Appendix at pp. 45 to 46.)

STATEMENT OF THE CASE

This case was the third action which Mr. Tal and his associates have brought or caused to be brought in an effort to thwart a private development which was to be part of the MAPs program in Oklahoma City. *Oklahoma City v. Oklahoma City Urban Renewal Authority*, 1999 OK 71, 988 P.2d 901 ("*Tal I*"); *State of Oklahoma ex rel. Moshe Tal v.*

Norick, 1999 OK 85, 991 P.2d 999 ("*Tal II*"). *Tal I* and *Tal II* each made their way to the Oklahoma Supreme Court. MAPs is an acronym which stands for Metropolitan Area Projects. In 1993 the people of the City of Oklahoma City approved a special purpose sales tax to construct public improvements to Oklahoma City and to encourage private development around the new public improvements. Moshe Tal, the principal of the Petitioner group, was an unsuccessful bidder for a private development on real property partially acquired under the MAPs program. A discussion of the history of MAPs and the selection of a developer other than Mr. Tal is contained in the Opinion of the Oklahoma Supreme Court in *Tal I*.[2] There the Court noted that the selection of the private developer for the partial tract of real property and the rejection of the Tal development plan was made "by the City Council only after two years of public meetings, public notices, public hearings, and citizen review." *Id.* at 905.

After his bid was rejected, Mr. Tal began a campaign of appeals and frivolous litigation designed to thwart the winning developer from progressing with its private development.

In *Tal I,* the Oklahoma Supreme Court affirmed and approved the political actions of the City in selecting the

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[2] Mr. Tal was a principal and advanced the Cordish/CCBT development proposal. It lost in a 5-4 decision by the elected members of the Oklahoma City Council. The winner was the TMK/Hogan development proposal. Since the decision of the City Council, Mr. Tal and the TAR members have sought to prevent the development proposed by TMK/Hogan.

winning developer and rejecting the Tal favored proposal. In so ruling, the Oklahoma Supreme Court held that the actions of the City were in all respects lawful. Even though there were disagreements among city council members in the ultimate votes on the various projects, the fact that those disagreements were resolved against Mr. Tal does not in any way support his claim that the various agreements with the winning developer were fraudulent, unlawful or otherwise inadequate. Perhaps the Oklahoma Supreme Court was engaged in wishful thinking when it said "This ends this inquiry." Mr. Tal refuses to accept those dispositions.

In *Tal II*, the Oklahoma Supreme Court affirmed the trial court's order dismissing Mr. Tal's *Qui tam* action because the City had taken action in response to his Demand, which resulted in the development agreements with the winning developer being held valid.

SUMMARY OF MR. TAL'S DEMAND AND THE ALLEGATIONS IN THIS CASE

This *Qui tam* action is premised on a "Written Demand" dated January 12, 1999 (the "Demand") made on the City to recover real property or assets which Mr. Tal alleges were wrongfully transferred. It is the only Demand applicable to this litigation. There are three (3) claims asserted by the plaintiffs in the Demand.

Claim 1 of the Demand is that the December 19, 1997 Parking Redevelopment Agreement and the February 4, 1998 Ground Lease constitute an illegal transfer of approximately 21 acres of real property by the City to the Oklahoma City

Urban Renewal Authority ("OCURA") and ultimately is to benefit the "Hogan's Parking Group".

The Parking Redevelopment Agreement is between OCURA and Bricktown Parking Investors, L.L.C. The Ground Lease is between the same parties. Both agreements were executed more than two years before the commencement of this action, which was filed March 15, 2000. These agreements committed the real property transferred by the City to OCURA located in the MAPs redevelopment area commonly or locally referred to as Bricktown, for use by TMK-Hogan[3].

Claim II of the Demand challenges the validity of the July 21, 1998 Redevelopment Agreement between OCURA and Bricktown TMK/Hogan Entertainment, L.L.C., and concerns itself with approximately 50 acres, which is made up of the same 21 acres identified in Claim I, which was acquired by condemnation by the City and then transferred to OCURA, and some 29 additional acres, which OCURA had acquired on its own and sometime earlier than the MAPs project, financed primarily with federal monies.[4]

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[3] When we are not required to be specific, we sometimes refer to the several TMK/Hogan entities as "TMK-Hogan."

[4] As to the additional 29 acres, the City has not owned that property and MAPS monies were not involved in the acquisition. Arguably, there is nothing that officers of the City can seek to recover for itself and, accordingly, there is nothing as to that land to be claimed in the *Qui tam* action brought by Tal.

Claim II of the Demand alleges that the Redevelopment Agreement is a wrongful transfer of the entire property (approximately 50 acres) by the City and OCURA to TMK/Hogan. This Redevelopment Agreement is within two years of the filing of the lawsuit (March 15, 2000). To the extent, however, that it applies to the 21 acres, it is well beyond two years that the real property was transferred and committed for use by TMK/Hogan, as noted in Claim I of the Demand.

Claim III of the Demand is brought to recover monies spent on a new power plant to provide heating and air conditioning to serve the remodeled and enlarged Myriad Convention Center and the new Sports Arena.

These are the only claims made in the Demand of January 12, 1999 while Petitioners allege that they made "60 plus allegations of wrongdoing" (Petition for Writ of Certiorari, p. 6), these are the only claims raised in the Demand based on the "60 plus allegations." From this Demand, the Plaintiffs' Petition in the trial court attempted to allege six counts or causes of action for relief against the City, the current and past Mayor of the City, officers and key employees of the City, and other private citizens. Each of these counts will be summarized below.

Count I of the Petition sought to invalidate the transfers of real property, the resolution adopted by the City Council authorizing the transfer of real property, and the Parking Redevelopment Agreement, and the Ground Lease described in *Tal I*. Count I also sought to remove a number of existing

public servants from their offices. As it relates to the validity of the City's actions, Count I is barred by the doctrines of issue and claim preclusion and by applicable statute of limitations. To the extent that Count I claim sought the removal from office of officers and officials of the City, the Petitioners, in a *Qui tam* action, lack standing to seek that relief.

Count II sought to recover approximately 50 acres of real property (21 of the 50 acres is that sought to be recovered under Count I) and the cancellation of the July 21, 1998 Redevelopment Agreement.

Count III of the Petitioners' Petition challenged the decision of the City to build a new power plant to furnish heat and air conditioning to the refurbished Myriad and the new Sports Arena. The simplest analysis of this Count is that the Petitioners disagree with the elected members of the City Council's business decision to build a new power plant, instead of extending service from an existing plant. The proper office of a *Qui tam* action is not to second guess the business decisions of elected government representatives. Furthermore, this Count III is barred by applicable statute of limitations.

The Petition further alleged that the entire MAPs Redevelopment Plan is illegal. This claim is barred by issue and claim preclusion, and the applicable statute of limitation. Furthermore, and perhaps more fundamentally, the Petitioners here never filed a demand challenging the validity in the entirety of the MAPs Redevelopment Plan.

Counts IV, V and VI of the Petitioners' Petition was a repackaged version of allegations and arguments rejected by the Oklahoma Supreme Court in *Tal I*. In these Counts, the Petitioners again argued that the Parking Redevelopment Agreement, the Ground Lease and the July 21, 1998 Redevelopment Agreement are illegal. These three agreements and the Redevelopment Plan were specifically approved in *Tal I*, wherein the Oklahoma Supreme Court held:

> The case had been tried and the record developed supports the trial court's findings that the property at issue was sold at its fair market value and that the protections for the public to safeguard its interests spelled out in the Agreements were adequate. **THIS ENDS THE INQUIRY** and T.A.R.'s expression of a contrary opinion in its Demand without actual support, does not change the result. *Tal I*, at 906 (Emphasis added).

ARGUMENT

REASON FOR DENYING THE WRIT

The Petition for Writ of Certiorari argues that the Petitioners had due process rights that were violated by the Oklahoma Supreme Court's application of a long-standing state law rules of issue and claim preclusion and interpretation of the Oklahoma's *Qui tam* statutes. However, as will be demonstrated below, Petitioners did not have any personal or individual property right whatsoever that would trigger a due

process inquiry. Petitioners were not deprived of life, liberty or property within the meaning of the Fourteenth Amendment so as to entitle them to procedural or substantive due process. As has been explained in the context of *Qui tam* actions:

> A *Qui tam* relator has Article III standing only as a relator, on behalf of the government. His standing is in the nature of an assignee of the governments claim . . . thus there is one claim, the government's, pursuable either by the *Qui tam* relator on behalf of the government or by the government on its own behalf.
>
> "In a *Qui tam* case, only the government has a dog in the fight." *United States, ex rel. Barajas, v. Northrop Corporation*, 147 F.3d 905 (9th Cir. 1998), *Id.* at 910.

ARGUMENT

The opinion below involves only the routine application of long-standing Oklahoma state law rules regarding claim and issue preclusion and the interpretation of Oklahoma's *Qui tam* statutes. There are no federal statute interpretations involved in this action nor, notwithstanding the petitions protestations to the contrary, are there serious substantive or procedural federal constitutional claims.

PROPOSITION 1

PETITIONERS HAVE FAILED TO PRESERVE FOR REVIEW THEIR CONTENTION OF DUE PROCESS STANDING.

Petitioners filed a Petition for Rehearing before the Oklahoma Supreme Court after promulgation of the Opinion now sought to be reviewed. (Appendix, pp. 41-52). In that Petition for Rehearing, Petitioners stated:

> The taxpayer is not asking this Court to reconsider its decision affirming the trial court's dismissal of the action.

From the denial of their Petition for Rehearing, the Petitioners now apply to this Court for a Writ of Certiorari. Clearly the Petition for Rehearing did not raise or address the alleged constitutional issues now sought to be brought before this Court. In *Bankers Life and Casualty Company v. Crenshaw*, 486 U.S. 71, 108 S.Ct. 1645, 100 L.Ed. 2d 62 (1988), this Court held that where the Federal Constitution issue is not clearly raised in a petition for rehearing filed in the state supreme court, the issue would not be considered. In the *Crenshaw* case, the Court described the references to the constitutional issues in the petition for rehearing as "vague" and "oblique." *Id.* at 77. Here, the Petitioners' Petition for Rehearing does not rise to the level of "vague" or "oblique." It is completely devoid of any reference to a constitutional issue.

Thus having petitioned the Oklahoma Supreme Court for rehearing, but not having raised the constitutional issue now sought to be urged, the Petitioners have waived any such claim of error.

PROPOSITION 2

PETITIONERS' LIFE, LIBERTY OR PROPERTY WAS NOT VIOLATED.

Petitioners attempt to raise a denial of due process claim. However, when this argument is examined in the light of the due process jurisprudence, the error underpinning Petitioners' argument become obvious.

Due process is broken down into two distinct concepts, substantiative and procedural due process. What Petitioners are complaining of is that they were denied procedural due process through the trial court's denial of their motion to intervene in the *Tal I* declaratory judgment action initiated by the City in response to Petitioners' Demand. The Oklahoma Supreme Court affirmed the denial of Petitioners' Motion to Intervene in *Tal I*. Petitioners contend that they were denied procedural due process by the *res judicata* effect given to the Oklahoma Supreme Court's determination in *Tal I* that the City was adequately representing its claims.

A procedural due process requirement requires two distinct inquiries. First, did the Petitioners loose something that fits into the three separate protected categories of life, liberty or property. If so, the Court then moves to the second

part of the inquiry; did the Petitioners receive the minimum measure of procedural protection warranted under the circumstances. *Cleveland Board of Education v. Loudermill*, 470 U.S. 532, 541, 105 S.Ct. 1487, 1493, 84 L.Ed.2d 494 (1985). There, this Court stated that once it is determined that the due process clause applies, "the question remains, what process is due." *Morrissey v. Brewer*, 408 U.S. 471, 481,92 S.Ct. 2593, 260, 33 L.Ed.2d 484 (1972). Property interests are created, and their dimensions are to define by existing rules or understandings that stem from an independent source such as state law. *Board of Regents of State Colleges v. Roth*, 408 U.S. 564, 571, 92 S.Ct. 2701, 2706, 33 L.Ed.2d 548 (1972).

In this case, the analysis ends with the first part of the inquiry. Petitioners were not deprived of life, liberty or property. They had no protected property right in the case. Since Petitioners lack any protected right of life, liberty or property, they were not entitled to any form of procedural due process. One who has no property interest at issue may not insist on receiving notice or an opportunity for hearing. *Turley v. Flag-Redfern Oil Company*, 1989 OK 144, 782 P.2d 130. To have a constitutionally protected interest sufficient to be entitled to due process, the party must have more than an abstract need and must have a legitimate claim of entitlement that is defined by an existing rule or understanding that stems from the independent source such as state law. *Roth, supra.*

In this *Qui tam* action, it cannot be overemphasized that the underlying right to be vindicated, if any, ultimately

belongs to the City of Oklahoma City. The Petitioners own nothing. They own no claim and are entitled to make no substantive decisions regarding the business matter of the City of Oklahoma City. The distinction between the rights of the government and the rights of the relator in *Qui tam* actions have been explored in some depth. In the *United States, ex rel. Barajas v. Northrop, supra.*, the Ninth Circuit considered the *res judicata* effect of a settlement and resultant dismissal by the government in a *Qui tam* action under the False Claims Act. In the *Barajas* case, the relator had asserted two claims under the False Claims Act. Two issues were raised relating to the alleged defects in a cruise missile. First was a question of whether or not adequate testing had been performed of a particular part and secondly was whether certain fluids included in the part met specifications. The person who allegedly falsified the reports regarding testing, after being fired, sued Northrop under the *Qui tam* provision of the False Claims Act. The government investigated and elected to take over the action as is allowed by the False Claim Act. The government amended the claim and asserted only the falsified test results and did not claim the liquids failed to meet the required specifications. Northrop was later indicted on criminal violations under the False Claims Act and ultimately pled guilty to the indictment and settled with the government under the *Qui tam* action. The government itself was settling, however, only their claims relating to the falsified test results and not the defective liquids. However, the Ninth Circuit held that the resultant dismissal dismissed all claims relating to the invoices at issue not just the claims relating to the falsified test reports. In holding that the *Qui tam* relator was barred by *res judicata* from asserting claims relating to the

defective liquids, the Court observed that *res judicata* bars relitigation of all grounds of recovery that were asserted or could have been asserted in a previous action between the parties where the previous action was resolved on the merits. The Court observed that both claims, the false certification and the defective fluid claims, arose from the same transaction, specifically the construction and invoicing of a flight data transmitter. The Court held that there is only one claim, the governments, pursuable either by the *Qui tam* relator on behalf of the government or by the government on its own behalf.

Similarly, in *United States v. Schimmels*, 127 F.2d 875 (9th Cir. 1997), the Ninth Circuit applied this Court's statement of *res judicata* in *Montana v. United States*, 440 U.S. 147, 153, 99, S.Ct. 970, 973, 59 L.Ed.2d 210 (1979) to a *Qui tam* action in holding that the doctrine of privity extends the conclusive effect of a judgment to non-parties who are in privity with the parties in the earlier action. The Court then held that the *Qui tam* provisions of the False Claims Act created "sufficiently close" relationship between the United States and the private relators such that the government was bound by the adverse judgment entered against the relators in the proceeding.

Here, the converse is true. The Petitioners are bound by the determinations made in the declaratory judgment action commenced and prosecuted by the City (Tal I), the party that actually "owns" the claim.

This distinction of who owns the claim is what distinguishes this case from *Hansbury v. Lee*, 311 U.S. 32 (1940) and makes petitioners reliance on the *Hansbury* case misplaced. In *Hansbury v. Lee* the party aggrieved and against whom issue preclusion was sought to be applied owned a claim or right that was being infringed upon by the purported application of issue preclusion. The case involves an action to enforce a race exclusion provision in covenants affecting real property. The covenant in question provided for a specified period of time no part of the land covered by the covenant should be "sold, leased or permitted to be occupied by any person of the colored race." The covenant provided that it would not become effective unless it was signed by 95% of the owners of the property within the area. The lawsuit at issue was an action by the respondents seeking to enjoin the petitioners from violating the racial covenant. The petitioners argue that the covenant had never become effective because owners of 95% of the property had not signed it. Respondents attempted to answer this claim by alleging that *res judicata* through a prior decree in an earlier suit to which the respondents were not a party had preclusive effect and barred respondents from relitigating the issue. In the *Hansbury* case, it was clear that none of the petitioners was the successor in interest to or in privy with any parties of the early suit and their predecessors had not signed the underlying covenant. In *Hansbury*, the petitioners in fact owned a property right that was being affected by the issue preclusive effect attempted to be given to the underlying judgment. Specifically, they owned property to which the covenant was attempting to be attached. Their right to own the property or convey it to people "of the colored race" was

purporting to be restricted under the terms of the covenant and the prior decree.

Here, however, the Petitioners own no right and have no claim that is being affected by the preclusive effect given to the underlying judgment. Furthermore, they are in privy to and were participants in the prior litigation. It is the Oklahoma Supreme Court's determination in *Tal I* that is entitled to and was given preclusive effect in *Tal III*. *Tal I* is the underlying appeal from Petitioners denial of Petitioners' intervention in that case where the Oklahoma Supreme Court found that the claims were being adequately represented by the City.

Petitioners' misplaced reliance on *Hansbury v. Lee* is further demonstrated by the case of *Smith v. Alleghany Corporation*, 394 F.2d 381 (2nd Cir. 1968). In the *Smith v. Alleghany Corporation* case, the situation presented was a stockholders derivative action. The Court observed it is very different from the type of claim asserted in *Hansbury*. Similar to a *Qui tam* action, in a stockholders derivative suit there is but one claim, not separate claims as was presented in *Hansbury*.

The *Qui tam* statutes of Oklahoma are purely a creature of Oklahoma law. There is no independent right to bring such an action absent the creation of the Oklahoma statutes. This Court examined the history of *Qui tam* actions in its opinion in *Vermont Agency of Natural Resources v. United States, ex rel. Stephens*, 529 U.S. 765, 120 S.Ct. 1858, 146 L.Ed.2d 836 (2000). There the Court observes that *Qui tam*

actions had their origin around the end of the Thirteenth Century. *Qui tam* actions generally fell into disuse in the Fourteenth Century although appearing to remain technically available. Parliament then began enacting statutes that explicitly provided for *Qui tam* suits. *Id.* at 774. The Court further observed, however, although *Qui tam* actions, were prevalent for a period immediately before and after the framing of the Constitution, "[t]here is no evidence that the Colonies allowed common law *Qui tam* actions. . ." *Id.* at 776.

Therefore, the right the Petitioners sought to assert in this action is purely a creation of the Oklahoma *Qui tam* statutes and must be defined and interpreted within the boundaries of those statutes. Under Oklahoma's *Qui tam* statutes, the relator of the *Qui tam* action only has a role if the City does not respond to the written demand. Here, the City did respond to the Demand by bringing a declaratory judgment action to test the validity of the underlying development agreements. Like the *Barajas* case, however, the City does not have to adopt all of the claims of the relators. There was essentially, however, only one claim that the Redevelopment Agreements were illegal and the real property consisting of approximately 50 acres should be recovered for the City. The trial court in *Tal I* made the determination that those development agreements were legal and valid, under Oklahoma law, and that the principal relator and the unsuccessful attempted developer, had no standing to intervene in the declaratory judgment action brought by the City. That determination was made by the trial court after the trial court reviewed in detail the deposition of relator's

principal protagonist, Mr. Tal. Petitioners attempt to make an issue of the fact that his deposition, and others, were not taken by the City, but were conducted by co-defendants. There was no need for the City's counsel to re-plow ground or duplicate the taking of a deposition, attended by the City, and adequately covered by the co-defendants' counsel.

In as much as there was only one claim to be vindicated in the *Qui tam* action, specifically a claim owned by the City of Oklahoma City, the determination made not once but at least three times by the Oklahoma Supreme Court that those contracts and agreements are lawful ends the inquiry.

PROPOSITION 3

IT IS NOT THE PROPER FUNCTION OF THIS COURT IN A QUI TAM ACTION TO SUPERCEDE ITS JUDGMENT FOR THAT OF THE CITY OF OKLAHOMA CITY'S ELECTED REPRESENTATIVES

Petitioners' principal complaint is that he is unhappy with the results of the selection process. He asks this Court to substitute its own judgment for that of the City Council and make the business decision that Mr. Tal and the Cordish/CCBT group should have been chosen as the developer for the 50 acres of land.

In *Tal I*, the Oklahoma Supreme Court observed that it was not for the Court to decide whether a more attractive deal was available for the City. "Such issues were for City

Council and the City Council resolved them." *Tal I*, at 906. The Court concluded by holding that there was no evidence that the declaratory judgment action that the City had commenced was collusive or fictitious and therefore it fully and completely approved each of the actions complained of in that proceeding. *Id.* at 907-908.

The Oklahoma Supreme Court has repeatedly enforced the separation of powers concept and recognized that the function of a *Qui tam* action was not to reevaluate the business decisions made by City officials. In *State ex rel. Brown v. City of Warr Acres*, 1997 OK 117, 946 P.2d 1140, the Court addressed complaints regarding the City of Warr Acres' decision to support the building of a Wal-Mart Super Center in its community. The Court there observed that economic development was recognized as a legitimate public purpose, and the City Council is the legislative body of a city. As such, it is the City Council's function to determine what expenditures are designed to promote the public good and welfare of the city and its inhabitants. It has no limitations as to expenditures, "save and except those which are expressly placed on its exercise by the Constitution of the State." *Id.* at ¶ 17, 1144. In this case, the City Council's authority to determine what is best for the City of Oklahoma City should not be ignored by this Court.

It is not for this Court, or any other court for that matter, to revisit the wisdom of the Oklahoma City Council's business decisions as to what is best for the City. It is the basic function of representative government that decisions in this country are made by our elected officials. As Justice

Douglas stated for the Court the Opinion in *Olsen v. Nebraska*, 313 U.S. 236, 61 S.Ct. 862, 85 L.Ed. 1305 (1941) "we are not concerned, however, with the wisdom, need, or appropriateness of the legislation. Differences of opinion on that score suggest a choice which should be left where . . . it was left by the Constitution -- to the State and to Congress." *Id.* at 246.

For the judiciary to be receptive to reevaluating the business judgment of elected government officials by entertaining complaints by citizenry that various actions were either unwise or unnecessary, thwarts the basic concept of the Republic and should not be entertained by this Court.

PROPOSITION 4

PETITIONERS WERE GIVEN AN ADEQUATE OPPORTUNITY TO BE HEARD WHEN THEY SOUGHT TO INTERVENE IN *TAL I*

Petitioners were afforded an opportunity to be heard. Their written demand and their individual depositions were made a part of the record considered by the trial court in *Tal I*. As the Oklahoma Supreme Court opinion in *Tal I* demonstrates, the trial court gave Petitioners their opportunity to be heard on that motion. As the Oklahoma Supreme Court observed:

> On February 22 and 23, 1999, Defendants took the deposition of Appellants . . . . Appellants' attorney appeared at each of the depositions. Tal's

deposition was 129 pages long. After the trial had commenced, Appellants' attorney filed a motion to intervene and for continuance. The trial court, after argument of counsel, considering the depositions of Tal and the other T.A.R. members who had been deposed, and also considering T.A.R.'s Written Demand, denied T.A.R.'s motion to intervene.

* * *

Tal's claims that the failure of the trial court to allow him to intervene and hear his testimony was prejudicial to his rights and those of T.A.R. We note, however, that the trial court considered Tal's 129 page deposition and Tal does not suggest that there are any facts in support of his claim of unlawfulness beyond those contained in the allegations of T.A.R.'s Demand. The trial court read and considered T.A.R.'s Written Demand and the depositions of all of its members. It is obvious that the trial court concluded that the factual allegations in T.A.R.'s Demand and the deposition testimony of its members were insufficient to support T.A.R.'s claim for intervention. For the reasons previously discussed, we agree. *Tal I*, at 906.

* * *

> The trial court heard T.A.R.'s arguments and read the depositions of its members before ruling on T.A.R.'s motion to intervene. *Tal I*, at 907.
>
> * * *
>
> T.A.R. was not entitled to intervene in Oklahoma City's declaratory judgment action because Oklahoma City was representing the rights of all of its taxpayers and was entitled to the presumption that it would do in good faith. T.A.R. failed to overcome this presumption. Further T.A.R. made no claim and the record would not support that Oklahoma City's suit was conclusive or frivolous. Thus, the trial court did not error in denying both T.A.R.'s motion to intervene and its motion for continuance. *Tal I*, at 908.

It is clear from the foregoing that the Oklahoma Supreme Court observed not just once or twice, but at least four times in its Opinion in *Tal I* that the trial court had carefully considered TAR's motion to intervene, the Written Demand of January 12, 1999, filed with the City, and his deposition and the deposition testimony of the TAR members

The Petitioners, in their brief, try to give justifications for reasons that their proposed petition in intervention in *Tal I* was limited in scope. Such strategic decisions by the Petitioners' counsel, does not constitute a deprivation of procedural due process. The fact that they chose not to tell

what they now contend is their whole story, does not mean that they were not given the opportunity to do so. All the due process requires is the opportunity to be heard. The Petitioners cannot now be heard to turn their decision to hide behind the log into a denial of due process and an opportunity to be heard. Clearly, Petitioners had their opportunity, they argued their motion to intervene, the trial court clearly considered their deposition testimony and their Written Demand, the fact that they chose not to present all of that which they now contend is the whole story is immaterial to the due process inquiry.

PROPOSITION 5

INDEPENDENT STATE LAW GROUNDS SUPPORT THE DECISIONS BELOW

The Motion to Dismiss filed by the Respondents and the Reply Brief in further support of the Motion (contained in the Appendix pages 1-21 and 22-39, respectively) alleged other grounds for dismissal of the action other than the issue preclusive effect of the prior Oklahoma Supreme Court Opinions. Specifically, Respondents argued that the district court lacked jurisdiction to oust government officials as was sought by the written demand and the Petition, that the Petition was barred by the Oklahoma State Law Statute of Limitations and that the goal of the Petition, specifically to revisit the business decision of the City of Oklahoma City, was not a proper function of the Court in a *Qui tam* action. These purely state law grounds for the underlying decision are sufficient to support the underlying decision. Therefore, this

Court should decline to review the underlying opinions of the Oklahoma Supreme Court which rest purely on state law grounds. *Klinger v. Missouri*, 13 Wall. 257 (1871); *Fox Film Coop v. Muller*, 296 U.S. 207, 56 S.Ct. 183, 80 L.Ed.158. (1935); *Murdock v. Memphis*, 20 Wall. 590 (1875); *Berea College v. Kentucky*, 211 U.S. 45 (1908); *Herb v. Pitcairn*, 324 U.S. 117, 65 S.Ct. 459, 89 L.Ed. 789 (1945).

CONCLUSION

For the foregoing reasons Petitioners' Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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APPENDIX

Appendix 1

IN THE DISTRICT COURT OF OKLAHOMA COUNTY
STATE OF OKLAHOMA

THE STATE OF OKLAHOMA, ex rel., Moshe Tal, et al., Plaintiffs,	)
v.	)Case No. CJ-2000-2052
THE CITY OF OKLAHOMA CITY, et al., Defendants.	)

MOTION TO DISMISS OF THE DEFENDANTS THE CITY OF OKLAHOMA CITY, RONALD J. NORICK, KIRK D. HUMPHREYS, JAMES E. THOMPSON, WILLIAM O. WEST AND DANIEL T. BRUMMITT AND BRIEF IN SUPPORT THEREOF

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April 5, 2000

Appendix 2

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Appendix 3

IN THE DISTRICT COURT OF OKLAHOMA COUNTY
STATE OF OKLAHOMA

THE STATE OF OKLAHOMA, ex rel., Moshe Tal, et al.,	)	
Plaintiffs,	)	
v.	)	Case No. CJ-2000-2052
THE CITY OF OKLAHOMA CITY, et al.,	)	
Defendants.	)	

MOTION TO DISMISS OF THE DEFENDANTS THE CITY OF OKLAHOMA CITY, RONALD J. NORICK, KIRK D. HUMPHREYS, JAMES E. THOMPSON, WILLIAM O. WEST AND DANIEL T. BRUMMITT AND BRIEF IN SUPPORT THEREOF

The defendants, The City of Oklahoma City ("City"), and the individuals Ronald J. Norick, Kirk D. Humphreys, James E. Thompson, William O. West and Daniel T. Brummitt, for reasons more fully set out below and pursuant to 12 O.S. § 2012 hereby move this Court to dismiss the subject action. In support of their motion, the defendants would show the Court as follows:

INTRODUCTION

This is the third action which Mr. Tal and his associates have brought or caused to be brought in an effort to thwart the development of the MAPS program in Oklahoma

City. *Oklahoma City v. Oklahoma City Urban Renewal Authority*, 1999 OK 71, 988 P.2d 901 ("*Tal I*"); *State of Oklahoma ex rel. Moshe Tal v. Norick*, 1999 OK 85, 991 P.2d 999 ("*Tal II*"). *Tal I* and *Tal II* have made their way to the Oklahoma Supreme Court. In *Tal I*, the Oklahoma Supreme Court affirmed and approved the actions of the City. In so ruling, the Oklahoma Supreme Court held that the actions of the City were in all respects lawful. Even though there were disagreements among city council members in the ultimate votes on the various projects, the fact that those disagreements were resolved in a way that Mr. Tal does not like does not in any way support his claim that the various agreements were fraudulent, unlawful or otherwise inadequate. Perhaps the Oklahoma Supreme Court was wishful thinking when it said "This ends this inquiry." Obviously, Mr. Tal refuses to accept those dispositions.

In *Tal II*, the Oklahoma Supreme Court affirmed this Court's order dismissing Mr. Tal's *Qui tam* action as premature because the City had taken action in response to his Demand.

In this action ("*Tal III*"), Mr. Tal not only seeks to revisit the issues decided by the Oklahoma Supreme Court in the *Tal I* and *Tal II*, but he also seeks to oust the above individual defendants from their government offices. For the reasons more fully set out below, these defendants will show the Court that the legality and legitimacy of the City's actions have in all respects been approved in *Tal I* and *Tal II*, that plaintiffs' claims are barred by applicable statute of limitations, and that the plaintiffs, under clear Oklahoma Supreme Court authority, lack the standing to seek the removal from office of the above individual defendants.

Appendix 5

SUMMARY OF MR. TAL'S DEMAND AND THE ALLEGATIONS IN THIS CASE

This *Qui tam* action is keyed on a Demand made on the City to recover property or assets which Mr. Tal alleges were wrongfully transferred to another. The Demand was filed with the City on January 12, 1999. It is the only Demand applicable to this litigation. A copy of the Demand is attached to the Petition filed herein by the Plaintiffs. There are three (3) claims asserted by the plaintiffs in the Demand.

Claim 1 of the Demand is that the December 19, 1997 Parking Redevelopment Agreement and the February 4, 1998 Ground Lease constitute an illegal transfer of approximately 21 acres of real property by the City to the Oklahoma City Urban Renewal Authority ("OCURA") and ultimately is to benefit the "Hogan's Parking Group". (*See* Demand at p. 2.)

The Parking Redevelopment Agreement is between OCURA and Bricktown Parking Investors, L.L.C. (*See* Demand at p. 2.) The Ground Lease is between the same parties. (*See* Demand at p. 2.) Both agreements were executed more than two years before the commencement of this action, which was filed March 15, 2000. These agreements committed the real property transferred by the City to OCURA located in the redevelopment area of Bricktown, for use by TMK-Hogan[1]. All this occurred more than two years before this litigation was begun.

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[1] When we are not required to be specific, we sometimes refer to the several TMK/Hogan entities as "TMK-Hogan."

Claim II of the Demand challenges the validity of the July 21, 1998 Redevelopment Agreement between OCURA and Bricktown TMK/Hogan Entertainment, L.L.C., and concerns itself with approximately 50 acres, which is made up of the same 21 acres identified in Claim I, which was acquired by condemnation by the City and then transferred to OCURA, and some 29 additional acres, which OCURA had acquired on its own, financed primarily with federal monies.[2] (*See* Demand, at p. 7.)

Claim II of the Demand alleges that the Redevelopment Agreement is a wrongful transfer of the entire property (about 50 acres) by the City and OCURA to TMK/Hogan. This Redevelopment Agreement is within two years of the filing of the lawsuit (March 15, 2000). To the extent, however, that it applies to the 21 acres, it is well beyond two years that the real property was transferred and committed for use by TMK/Hogan, as noted in Claim I of the Demand.

Claim III of the Demand is brought to recover monies spent on a new power plant to provide heating and air conditioning to serve the remodeled and enlarged Myriad Convention Center and the new Sports Arena. (*See* Demand, at pp. 12-15.)

These are the only claims made in the Demand of January 12, 1999. From this Demand, the Plaintiffs' Petition

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[2] As to the additional 29 acres, the City has not owned that property and MAPS monies were not involved in the acquisition. Thus, there is nothing that officers of the City can seek to recover for itself and, accordingly, there is nothing to be claimed by the *Qui tam*.

attempts to allege six counts or causes of action for relief against the City, the current and past Mayor of the City, officers and key employees of the City, and other private citizens. Each of these counts will be summarized below.

Count I of the Petition seeks to invalidate the transfers of real property, the resolution adopted by the City, the Parking Redevelopment Agreement, the Ground Lease and the July 21, 1998 Redevelopment Agreement described in *Tal I*. Count I also seeks to remove a number of public servants from their existing offices. As will be shown below, this Count I, as it relates to the validity of the City's actions, is barred by the doctrines of issue and claim preclusion and by applicable statute of limitations. To the extent that Count I claim seeks the removal from office of all the various officers and officials of the City, it will be shown conclusively, that the Plaintiffs lack standing to seek that relief.

Count II of the Plaintiffs' Petition challenges the decision of the City to build a new power plant to furnish heat and air conditioning to the refurbished Myriad and the new Sports Arena. The simplest analysis of this Count is that the Plaintiffs disagree with the City's business decision to build a new power plant, instead of extending service from an existing plant operated by Trigen. The proper office of a *Qui tam* action is not to second guess the business decisions of elected government representatives. Furthermore, this Count II is barred by applicable statute of limitations.

Count III alleges that the entire MAPS Redevelopment Plan is illegal. This claim is barred by issue and claim preclusion, and the applicable statute of limitation. Furthermore, and perhaps more fundamentally, the plaintiffs

here never filed a demand challenging the validity of the MAPS Redevelopment Plan.

Counts IV, V and VI of the Plaintiffs' Petition is a repackaged version of allegations and arguments rejected by the Oklahoma Supreme Court in *Tal I*. In these Counts, the plaintiffs again argue that the Parking Redevelopment Agreement, the Ground Lease and the July 21, 1998 Redevelopment Agreement are illegal. These three agreements and the Redevelopment Plan were specifically approved by Judge Gray of this Court, and that ruling was affirmed in *Tal I*:

> The case had been tried and the record developed supports the trial court's findings that the property at issue was sold at its fair market value and that the protections for the public to safeguard its interests spelled out in the Agreements were adequate. **THIS ENDS THE INQUIRY** and T.A.R.'s expression of a contrary opinion in its Demand without actual support, does not change the result. *Tal I*, at 906 (Emphasis added).

PROPOSITION 1

THE DISTRICT COURT HAS NO JURISDICTION OVER ACTIONS BY CITIZENS FOR OUSTER OF GOVERNMENT OFFICIALS

Perhaps the most glaring of the defects in Plaintiffs' Petition is their effort to seek the judicial removal from office of various government officials basically for the reason that Mr. Tal disagrees with the actions taken by those individual

defendants. Plaintiffs cloak those allegations with hyperbole, but in any event those allegations need not be disposed of nor decided by this Court. Mr. Tal's allegations range from nefarious actions by some to simple non-performance of a particular individual's responsibilities. Nonetheless, plaintiff's Count I, seeking the removal from office of the individual defendants must be dismissed.

Since 1927, the Oklahoma Supreme Court has held that the individual citizens lack the standing and, in actions brought by individual citizens, that district courts lack jurisdiction over any action seeking removal of elected and other officials.

11 Okla.Stat. § 8-107 provides that municipal officers may be removed from office for cause specified by applicable state law for the removal of state officers and by the methods therein prescribed. In *Alberty v. Parks*, 1927 OK 472, 261 P. 940, the Oklahoma Supreme Court issued a writ of prohibition against a district judge of Adair County who purported to exercise jurisdiction for the removal of school board members from their respective elective offices. The Supreme Court held that the district court was without jurisdiction to make any order in the case. The main action, as the Supreme Court observed, was an action by private individuals, as tax payers, to remove the defendants from public office. The Oklahoma Supreme Court held that "it is clear that the court is without jurisdiction to entertain this action." *Id.* at 940. The Supreme Court observed that the procedure for removal of elected officers is set out by statute and that "[t]he statute does not authorize the removal of members of a school board from office on petition filed by private citizens. The court, being without jurisdiction to hear

and try the main action, was without jurisdiction to issue an interlocutory order therein." *Id.* at 941.

The Oklahoma Supreme Court again addressed the same issue in *L-Acquarius v. Hampton*, 1982 OK 34, 642 P.2d 1143. Inmates had filed *pro se* petitions seeking the ouster of various officials and employees of the Department of Corrections. The petition asked the Oklahoma Supreme Court to assume original jurisdiction and issue a writ of mandamus requiring the respondent district judge to disqualify himself, and require both the Attorney General and the District Attorney to prosecute the inmates' *pro se* action for removal of the government officials and employees. The Oklahoma Supreme Court observed, as the Court had in the *Alberty* case, that proceedings to remove public officials and officers may be had only in the manner prescribed by statute. In holding that the district court lacked jurisdiction to entertain the action brought by private citizens, the Oklahoma Supreme Court stated:

> The district court is without jurisdiction to entertain an ouster action on petition filed in the district court by private citizens.
> *Id.* at 1144.

The Oklahoma Supreme Court reached that decision in a short four-paragraph *per curiam* opinion which cited the *Alberty* case as controlling authority.

Additionally, plaintiffs lack standing to seek treble monetary damages against current and past City officers. Plaintiffs' Demand makes no request for such relief. Therefore, plaintiffs cannot now seek monetary relief against the individual defendants.

It is therefore abundantly clear that this Court lacks jurisdiction to entertain plaintiff's claim for money damages or an ouster action against the public officers, officials and employees. The statutory scheme for such actions is exclusive. This was clearly held in the *L-Acquarius* and *Alberty* cases. The plaintiff's Count I and the allegations to the contrary are patently frivolous and brought in violation of 12 Okla.Stat. § 2011.

PROPOSITION 2

ON THE FACE OF THE PETITION THE CLAIMS ARE BARRED BY STATUTE OF LIMITATIONS

Plaintiffs attempt to allege that the 3 claims and the various issues which they attempted to raise in their Demand were not adjudicated in either *Tal I* or *Tal II*. While the moving defendants disagree with that conclusion, this Court is not required to plow that ground. If there were any claims or issues on which the City did not take action, the *Qui tam* action which plaintiff seeks to bring here is barred by the statute of limitations. Section 374 of Title 62 provides the limitations period for *Qui tam* actions. It states that these suits must be filed:

> [w]ithin six (6) months following the refusal, failure, or neglect of the proper officers to act upon the written demand.
> 62 Okla. Stat. §374 (1994).

Mr. Tal's Demand was filed on January 12, 1999. (See Petition, at p. 2, ¶2.) This action was not commenced

until March 15, 2000, which is more than six months after the Demand was filed.

Mr. Tal admits that the City responded to his Demand and brought an action for declaratory judgment in January of 1999, "less than two (2) days after the Taxpayers' Written Demand was filed." (See Petition, at p. 2, ¶2.) He claims, however, that this declaratory action did not address all of the claims he alleged in his Demand. (See Petition, at p. 3, ¶4.)

Mr. Tal's claims, to the extent that they are based upon issues allegedly omitted from the City's declaratory judgment suit, are not timely. He did not file this action within six months after the City's "refusal, failure or neglect" to act on those issues. His Demand was filed on January 12, 1999 and the City's suit was filed in January, 1999. He did not sue on the allegedly omitted issues until March, 2000. He is beyond the six month limitations period and his claims are barred.

PROPOSITION 3

IT IS NOT THE PROPER FUNCTION OF THE COURT IN A *QUI TAM* ACTION TO SUBSTITUTE ITS JUDGMENT FOR THAT OF THE CITY'S ELECTED REPRESENTATIVES

Mr. Tal's principle complaint regarding the power plant is that the plant was, in his view, unnecessary. He asks this Court to substitute its own judgment for that of the City Council and make the business decision of whether the new power plant was necessary.

In *Tal I*, the Oklahoma Supreme Court observed that it was not for the Court to decide whether a more attractive deal was available for the City. "Such issues were for City Council and the City Council resolved them." *Tal I*, at 906. The Court concluded by holding that there was no evidence that the declaratory judgment action that the City had commenced was collusive or fictitious and therefore it fully and completely approved each of the actions complained of in that proceeding. *Id.* at 907-908.

The Oklahoma Supreme Court has repeatedly enforced the separation of powers concept and recognized that the function of a *Qui tam* action was not to reevaluate the business decisions made by City officials. In *State ex rel. Brown v. City of Warr Acres*, 1997 OK 117, 947 P.2d 1140, the Court addressed complaints regarding the City of Warr Acres' decision to support the building of a Wal-Mart Super Center in its community. The Court there observed that economic development was recognized as a legitimate public purpose, and the City Council is the legislative body of a city. As such, it is the City Council's function to determine what expenditures are designed to promote the public good and welfare of the city and its inhabitants. It has no limitations as to expenditures, "save and except those which are expressly placed on its exercised by the Constitution of the State." *Id.* at ¶ 17, 1144. In this case, the City Council's authority to determine what is best for the City should not be ignored by this Court.

It is not for this Court, or any other court for that matter, to revisit the wisdom of the Oklahoma City Council's business decisions as to what is best for the City. It is the basic function of representative government that decisions in this country are made by our elected officials. The Oklahoma

Supreme Court has long recognized the autonomy of city governments. In *Utility Supply Company, Inc. v. City of Broken Arrow*, 1975 OK 106, 539 P.2d 740, the Court stated as follows:

> It is not the function of courts to substitute their judgment for that of duly-constituted municipal legislative authorities.
>
> * * *
>
> The powers of a city and how it should conduct its affairs are legislative functions. The only justiciable question is whether the authority granted or the exercise of it may be denominated as arbitrary and unreasonable.
>
> The police power of a municipality is comprehensive and is exercised to promote the health, comfort, safety or welfare of society. In the enactment of ordinances and regulations much must be left to the discretion of municipal authorities. Their acts will not meet with judicial interference unless they are manifestly unreasonable and oppressive, unwarrantedly invade private rights, clearly transcend the police powers given to them, or infringe upon the rights secured by fundamental law.
>
> * * *
>
> The court may not test in the balances of judicial review the weight and sufficiency of

> the facts which sustain the conclusion of the legislative body . . .
> *Id.* at 743 (citations omitted).

See also Glaser v. Tulsa Metropolitan Area Planning Commission, 1961 OK 47, 360 p.2d 247.

For the judiciary to be receptive to reevaluating the business judgment of elected government officials by entertaining complaints, by citizenry that various actions were either unwise or unnecessary, thwarts the basic concept of the republic and should not be entertained by this Court.

PROPOSITION 4

THE OKLAHOMA SUPREME COURT HAS FULLY AND COMPLETELY ADJUDICATED THE ISSUES RELATING TO THE LAWFULNESS OF THE MAPS REDEVELOPMENT PLAN AND THE ENTERTAINMENT COMPLEX

In *Tal I*, the Oklahoma Supreme Court addressed Mr. Tal's appeal from Judge Gray's denial of his motion to intervene and motion for continuance in a declaratory judgment action which the City had commenced in response to Mr. Tal's Demand. After an extensive analysis of the history of MAPS and the description of the transactions of which Mr. Tal complained, the Oklahoma Supreme Court held that the City's suit fully and completely determined the issues raised by Mr. Tal. Although Mr. Tal and his associates claim that the City's suit was not responsive to Mr. Tal's demand because the City did not support Mr. Tal's position, the Court held that the City was not required to do

so. In approving the City's actions, the Oklahoma Supreme Court stated as follows:

> The case has been tried and the record developed supports the trial court's findings that the property at issue was sold at its fair market value and that the protections for the public to safeguard its interests spelled out in the Agreements were adequate. **THIS ENDS THE INQUIRY** and T.A.R.'s expression of a contrary opinion in its Demand without actual support, does not change the result. (Emphasis added) *Id.* at ¶ 19.

The Court also observed that there was nothing in the record to reflect that the City had acted in bad faith. The Court stated that "[the City's] actions were taken under the glare of public scrutiny and were resisted by a significant minority of the City Council." The Court then observed that the fact that "the disagreements among Council members were resolved in a way that Tal and other T.A.R. members do not like does not support in any way T.A.R.'s claim that the development agreements were either fraudulent, unlawful, or otherwise inadequate." *Id.* at 906.

Now, in *Tal III*, Mr. Tal and the other plaintiffs ask this Court to revisit each of those determinations. Oklahoma law has long prohibited the re-litigation of issues previously determined by a court. The label Oklahoma courts place on the theory that prevents re-litigation of issues previously decided, has varied over time. In *Miller v. Miller*, 1998 OK 24, 956 P.2d 887, Justice Opala, writing for the Court, explained the difference between the doctrines of claim

preclusion and issue preclusion. Justice Opala stated as follows:

> Under the principle of claim preclusion, a final judgment on the merits of an action precludes the parties from re-litigating not only the adjudicated claim, but also any theories or issues that were actually decided or could have been decided in the action.

In defining issue preclusion, Justice Opala stated as follows:

> The other preclusion doctrine, which sometimes precisely goes under the name of *res judicata*, is issue preclusion. Under the doctrine of issue preclusion, once a court has decided and issue of fact or of law necessary to its judgment, the same parties or other parties may not litigate that issue in a suit brought under a different claim.

In conclusion Justice Opala observed as follow:

> The purpose of issue preclusion is to "relieve the parties of the cost and vexation of multiple law suits, conserve judicial resources and by preventing inconsistent decisions, encourage reliance on adjudication.

Clearly these laudable goals of issues and claim preclusion are lost on Mr. Tal. This is the third law suit arising from Mr. Tal's disappointment in not being selected as a developer of the Bricktown entertainment complex. His response to those decisions is not to be a supporter of the

development of Oklahoma City, but to do everything he can to thwart that development in the hope that further delay of the development will benefit him. It is clear from the reading of *Tal I* and *Tal II*, that the Oklahoma Supreme Court and the trial courts below have fully adjudicated the issues relating to the development of MAPS projects and determined that Mr. Tal's complaints are not supported by any evidence.

Mr. Tal also asks this Court to ignore the permanent injunction affirmed in *Tal I*. This injunction ordered the City and OCURA to perform the Development Agreements challenged in Mr. Tal's Demand. *Tal I*, 988 P.2d at 904.

A *Qui tam* action can not require the City to act in a manner that would cause it to violate a valid permanent injunction entered by the District Court of Oklahoma County, and upheld by the Oklahoma Supreme Court.

For the forgoing reasons, *Tal I* precludes re-litigation of those issues here and the petition should therefore be dismissed.

SUMMARY

Count I seeks to invalidate the Parking Redevelopment Agreement, the Ground Lease, and the July 21, 1998 Redevelopment Agreement. It also seeks the removal from their office of the individual defendants who hold public office. Count I should be dismissed. It is barred by issue and claim preclusion, the applicable statute of limitations and those plaintiffs lack the standing as a matter of law to commence a removal action against the individual defendants named in this suit and to seek money damages from them when none were addressed in their Demand.

Count II seeks to revoke the decision of the City Council to build a new power plant to service the remodeled and expanded Myriad and the new sports arena and to cause the City instead to negotiate a new agreement for heat and air conditioning with Trigen. Count II should be dismissed. It is not a proper use of a *Qui tam* action to seek to substitute the business judgment advanced by Mr. Tal for that of the City Council. Furthermore, this Count II is also barred by the application statute of limitations.

Count III attacks the validity of the June 24, 1997 Redevelopment Plan, which is also described as the MAPS Sports-Entertainment-Parking-Support Redevelopment Plan. The plaintiffs' Demand of January 12, 1999, does not describe this to be an illegal document and in fact the plaintiffs in all their earlier filings have not attacked this agreement. It cannot not be the object of a *Qui tam* action. Further, its validity has been previously determined in *Tal I* and that decision is binding on these plaintiffs. Count III must be dismissed.

Count IV on differing grounds, attacks the validity of the July 21, 1998 Redevelopment Agreement. For the same reasons set forth above in Count I, this Count IV should be dismissed.

Count V on differing grounds, attacks the validity of the Parking Redevelopment Agreement approved by the City Council on December 19, 1997. For the same reasons set forth above in Count I, this Count V should be dismissed.

Count VI attacks the transfer of approximately 21 acres of land for use in implementing the Parking Redevelopment Agreement, the Ground Lease, and the July

21, 1998 Redevelopment Agreement. For the reasons set forth in Count I, this Count VI should also be dismissed.

CONCLUSION

Plaintiffs' continued efforts to thwart the redevelopment in Bricktown that MAPS has provided for Oklahoma City should fall on deaf ears. Mr. Tal's issues have been litigated and fully decided. The plaintiffs seek again to second guess and substitute their judgment for the business decisions made by the elected government officials of Oklahoma City. It is not the function of the judiciary to reevaluate business decisions made by legislative branches of government. The Constitution and the statutes of Oklahoma encompass the concept of separation of powers. The judiciary should not second guess what the elected city officials have decided was best for the city.

For the foregoing reasons, these defendants pray this Court to dismiss the action with prejudice to future filing and

without leave to amend the pleadings, for such amendment will not cure the defects pointed out herein.

/S/ James F. Davis
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[Certificate of Service Omitted in Printing]

Appendix 22

IN THE DISTRICT COURT OF OKLAHOMA COUNTY
STATE OF OKLAHOMA

THE STATE OF OKLAHOMA, ex rel., Moshe Tal, et al., Plaintiffs,	)	
v.	)	Case No. CJ-2000-2052
THE CITY OF OKLAHOMA CITY, et al., Defendants.	)	

REPLY BRIEF OF DEFENDANTS THE CITY OF OKLAHOMA CITY, RONALD J. NORICK, KIRK D. HUMPHREYS, JAMES E. THOMPSON, WILLIAM O. WEST AND DANIEL T. BRUMMITT IN SUPPORT OF DEFENDANTS'S MOTION TO DISMISS

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April 24, 2000

Appendix 23

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Appendix 24

IN THE DISTRICT COURT OF OKLAHOMA COUNTY
STATE OF OKLAHOMA

THE STATE OF OKLAHOMA, ex rel., Moshe Tal, et al.,	)
Plaintiffs,	)
v.	)Case No. CJ-2000-2052
THE CITY OF OKLAHOMA CITY, et al.,	)
Defendants.	)

REPLY BRIEF OF DEFENDANTS THE CITY OF OKLAHOMA CITY, RONALD J. NORICK, KIRK D. HUMPHREYS, JAMES E. THOMPSON, WILLIAM O. WEST AND DANIEL T. BRUMMITT IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS

The defendants, The City of Oklahoma City ("City"), and the individuals Ronald J. Norick, Kirk D. Humphreys, James E. Thompson, William O. West and Daniel T. Brummitt, submit this reply brief in support of their motion to dismiss filed herein.

SUMMARY OF THE ARGUMENT

These defendants' motion to dismiss limited their argument to the four corners of the plaintiff's petition and the attachment thereto. Plaintiffs respond with fourteen (14) pages of allegations far beyond the scope of their petition and the Written Demand of January 12, 1999, which plaintiffs originally filed with the City of Oklahoma City. For the reasons more fully set out below, it will be shown that the defendants motion to dismiss must be granted.

ARGUMENTS AND AUTHORITIES

PROPOSITION 1

A MOTION TO DISMISS WHICH REFERS TO NO EVIDENTIARY MATERIAL OUTSIDE THE PLEADINGS IS NOT A MOTION FOR SUMMARY JUDGMENT

These defendants' motion to dismiss did not refer to any evidentiary material outside the scope of the plaintiffs' Petition and the documents attached thereto. Therefore, no reference to "facts" outside the scope of the pleadings should be allowed or considered by this Court in passing on the defendants' motion to dismiss. Even if the motion to dismiss of these defendants or that other defendants is treated as a motion for summary judgment, Rule 13 of the Rules of the District Court only required the Court to deny a motion if there is a "substantial controversy as to any MATERIAL fact."

Appendix 26

Summary judgment should be granted where there is no substantial controversy as to any material fact and one of the parties is entitled to judgment as a matter of law. Dist. Ct. Rule 13, 12 Okla. Stat. Ch.2, App. 1. A fact is material if proof of it would establish or refute an essential element of a claim or defense. *Cinco Enterprises, Inc. v. Benson*, 1994 OK 135, 890 P.2d 866. In *Hadnot v. Shaw*, 1992 OK 21, 890 P.2d 866, the Oklahoma Supreme Court defined a "material" fact for summary judgment purposes as stated above, and as follows:

> "In determining what constitutes a genuine issue as to any material fact for purposes of summary judgment, an issue is 'material' if the facts alleged are such as to constitute a legal defense or are of such nature as to affect the result of the action. *Austin v. Wilder*, 26 N.C.App. 229, 215 S.E.2d 794, 796 [1975]. See Fed.R.Civ.P. 56(c). A fact is 'material' and precludes ... summary judgment if proof of that fact would have effect of establishing or refuting one of essential elements of a cause of action or defense asserted by the parties, and would necessarily affect application of appropriate principle of law to the rights and obligations of the parties. *Johnson v. Soulis*, Wyo., 542 P.2d 867, 872 [1975]." Black's Law Dictionary, 5th Ed. at 881. See also *Olson v. A.H. Robins Co., Inc.*, 696 P.2d 1294, 1300 (Wyo.1985).

Id at 985, footnote 25.

A motion to dismiss is a proper approach to a case which is clearly barred by the doctrines of issue and claim preclusion. Even if the Court refers to evidentiary material to establish the preclusive judgment, that does not render the early granting of a motion to dismiss inappropriate. *National Diversified Business Services, Inc. v. Corporate Financial Opportunities, Inc.*, 1997 OK 36, 946 P.2d 662; *Ouellette v. State Farm Mutual Automobile Insurance Company*, 1994 OK 79, 918 P.2d 1363. The plaintiffs' "Statement of Facts," are all immaterial to the issues raised in these defendants' motion to dismiss. No amount of discovery will change the words on the pages of the opinions of the *Oklahoma Supreme Court in Oklahoma City v. Oklahoma City Urban Renewal Authority*, 199 OK 71, 988 P.2d 91 (*Tal I*) and *State of Oklahoma, ex rel. Moshe Tal v. Norick*, 199 OK 85, 991 P.2d 999 (*Tal II*). Therefore, these defendants motion to dismiss which is based, in part, on issue and claim preclusion should be granted and the plaintiffs' "Statement of Facts" disregarded.

PROPOSITION 2

THE PLAINTIFFS HAVE ADMITTED THEY CANNOT REMOVE THE CITY OFFICERS FROM THEIR ELECTED OR APPOINTED POSTS

As fully discussed in defendants' motion to dismiss, the District Court has no jurisdiction over actions by citizens for ouster of government officials. The defendants directed this Court's attention to the cases of *Alberty v. Parks*, 1927 OK 472, 261 P. 940 and *L-Acquarius v. Hampton*, 1982 OK 34, 642 P.2d 1143 which stand for the proposition that the District Court is without jurisdiction to entertain an ouster action on a petition filed in the District Court by private citizens. Plaintiffs' attempt to apparently retreat from their

own allegations by suggesting in Proposition 6 of their brief that they have not sought the removal of the officers from their appointed and elected positions through a direct action, but suggest that they have "asked the Court to exercise its power to instruct the City to have the appropriate authorities initiate proceedings to investigate certain officials conflicts of interest, conduct and if necessary remove them from office." This is a classic example of attempting to do indirectly that which the Oklahoma Supreme Court has held they cannot do directly. The Court cannot exercise discretionary authority to issue a writ of mandamus to the City of Oklahoma City to do something over which the Court lacks the subject matter jurisdiction. Both *Alberty* and *L-Acquarius* clearly hold that this Court lacks subject matter jurisdiction to remove elected or appointed city officials from their governmental posts. The statutory scheme for such actions, as more fully discussed in these defendants' motion for dismiss, is the exclusive remedy by which municipal officers may be removed from office for causes specified in the statutes. 11 Okla. Stat. § 8-107.

The plaintiffs' prayer for removal of officers from their governmental elected or appointed offices and for this Court to do indirectly through a writ of mandamus that which it is prohibited from doing directly must be dismissed.

PROPOSITION 3

PLAINTIFFS' CLAIMS ARE BARRED BY THE STATUTE OF LIMITATIONS

Plaintiffs make no serious effort to deny that their claims are barred by the applicable statute of limitations. Instead they attempt to misrepresent to this Court the holding of the Oklahoma Supreme Court in *Tal II*. They suggest that their

claims are not time barred because their cause of action did not accrue until the Oklahoma Supreme Court's final decision in *Tal I*. That is not the holding of the Oklahoma Supreme Court in *Tal II*. In *Tal II* the Oklahoma Supreme Court held that plaintiffs' claims regarding the second declaratory judgment action, which remains pending in this Court today, are premature for the reasons that the City was representing the rights of all of its taxpayers in pursuing the declaratory judgment action. *Tal II* does not say anything regarding the disposition of the issues raised in *Tal I* or, and perhaps more importantly, disposition of the issues not raised in the declaratory judgment action but of which the plaintiffs attempted to complain in their Demand. This is more fully discussed in Proposition 2 of these defendants' original brief. Plaintiffs' claims, to the extent that they are based on issues allegedly omitted from the City's declaratory judgment suits are time barred. Plaintiffs have not opposed this aspect of defendants' motion and therefore it is deemed confessed. Plaintiffs did not file this action within six (6) months of the City's "refusal, failure or neglect", to act on those issues not addressed in the declaratory judgment action. The plaintiffs' Demand was filed on January 12, 1999. The plaintiffs did not bring their current action on the allegedly omitted issues until March 15, 2000. Therefore, the plaintiffs' claims are beyond the 6 month period of time prescribed by 62 Okla. Stat. § 374 therefore time barred.

PROPOSITION 4

ISSUE PRECLUSION BARS NOT ONLY THE PARTIES BUT ALSO THEIR PRIVIES

Plaintiffs suggest that they are not barred by the doctrines of issue and claim preclusion for the reason that they

were not allowed to intervene in the City's declaratory judgment action. This argument assumes, however, that the plaintiffs had some independent right that was not derived from the City. Clearly they do not. The very nature of a *Qui tam* action is derivative in nature. The plaintiffs have no independent right. In *Wilson-Harris v. Southwest Telephone Co.*, 1943 OK 303, 141 P.2d 986, 193 Okla. 194, the Court stated "We have defined the term 'privity' as a "mutual or successive relationships to the same rights or property." *Arnold v. Joines*, 50 Okl. 4, 150 P. 130, 133." 141 P.2d at 990. Privity involves a person so identified in interest with another that he represents the same legal right. *Hildebrand v. Gray*, 1993 OK CIV APP 182, 866 P.2d 447. Here there is only one "legal right" involved. Plaintiffs have no private right. Their only claim is derivative. Therefore, plaintiffs are, by definition, privies of the City and thereby bound by the rulings in *Tal I* and *Tal II*.

As the Oklahoma Supreme Court stated in *Tal I*:

> The case has been tried and directive develop supports the trial courts finding that the property at issue was sold at fair market value and the protections for the public to safeguard this interest spelled out in the Agreements were adequate. **THIS ENDS THE INQUIRY.** In TAR's expression of a contrary opinion in its Demand without actual support does not change the result.

The Oklahoma Supreme Court held that there was nothing in the record to reflect that the City had acted in bad faith. The fact that issues were decided by the City Council in a manner that the plaintiffs do not like does not in any way

support their claim that the subject agreements were fraudulent, unlawful or otherwise invalid.

PROPOSITION 5

PLAINTIFFS' CLAIMS REGARDING DUE PROCESS ARE WITHOUT FOUNDATION

Plaintiffs attempt to boot strap themselves into a denial of due process claim. However, when this argument is examined in light of due process jurisprudence, the erroneous assumptions underpinning plaintiffs' argument become obvious.

The due process clause is broken down into two distinct concepts, substantive and procedural due process. What the plaintiffs are complaining of here is that they were denied procedural due process through Judge Gray's denial of their motion to intervene in the declaratory judgment action initiated by the City in response to plaintiffs' Written Demand. The Oklahoma Supreme Court affirmed the denial of plaintiffs' motion to intervene. If the plaintiffs believed that they were denied procedural due process, that issue should have been raised in their appeal from Judge Gray's denial of their motion to intervene. It was not, and the plaintiffs cannot now collaterally attack that order.

A procedural due process analysis requires two separate inquiries. First, did the plaintiffs lose something that fits into the three protected categories of life, liberty or property. If so, the court then moves to the second part of the inquiry; did the plaintiffs' receive the minimum measure of procedural protection warranted under the circumstances. *Farthing v. City of Shawnee, Kansas*, 39 F.3d 1131 (10th Cir. 1994).

In this case the analysis ends with the first half of the inquiry. The plaintiffs were not deprived of life, liberty or property. They had no protected property right in issue in this case. They certainly had no right to procedural due process for anything that they did not raise in their Demand. As a result, since the plaintiffs lack any protected right of life, liberty or property, they were not entitled to any form of procedural due process. The Oklahoma Supreme Court has recognized that one who has no interest may not insist on receiving notice or an opportunity for hearing. *Turley v. Flag-Redfern Oil Company*, 1989 OK 144, 782 P.2d 130. To have a constitutionally protected interest sufficient to be entitled to due process, the party must have more than an abstract need and must have a legitimate claim of entitlement that is defined by an existing rule or understanding that stems from some independent source such as state law. *Davila-hopes v. Zapata*, 111 F.3d 192 (1st Cir. 1997). The person must have more than an abstract need, he must have a legitimate entitlement to it. *Greenholtz v. Inmates of Nebraska Penal and Correction Complex*, 442 U.S. 1, 99 S.Ct. 2100, 60 L.Ed.2d 668 (1979).

If the Court were to determine that the plaintiffs did have some protected right, the second half of the inquiry, *i.e.* did the plaintiffs received the minimum measure of procedural protection warranted under the circumstances, is even easier. The consideration of what procedural due process may be required under any given set of circumstances begins with a determination of the precise nature of the governmental function involved as well as the private interest that has been affected by government action. In *McLin v. Trimble*, 1990 OK 74, 795 P.2d 1035, the Oklahoma Supreme Court observed that "[t]he Due Process Clause does not, by itself, mandate any particular form of procedure . . . Due Process

is not a technical concept with a fixed content unrelated to time, place and circumstances, 'Due Process is flexible and calls for such procedural protections as the particular situation demands.'" *Id* at 1040.

The Oklahoma Supreme Court has also held that the due process clause does not require a hearing in every conceivable case of government impairment of a private interest. *Medina v. State*, 1993 OK 121, 871 P.2d 1379.

Here the plaintiffs had no private interest that was affected by the government action. Furthermore, the governmental function is one that exclusively belongs to the legislative branch of government. As discussed in more detail in defendants' brief, it is not the proper function of the *Qui tam* action to second guess the business decision of the City's elected officials. As the Oklahoma Supreme Court has held in *Utility Supply Company, Inc. v. City of Broken Arrow*, 1975 OK 106, 539 P.2d 740:

> It is not the function of courts to substitute their judgment for that of duly constituted municipal legislative authorities . . . .
>
> The court may not test in the balances of judicial review the weight and sufficiency of facts which sustained the conclusion of the legislative body. *Id.* at 743.

The plaintiffs were afforded an opportunity to be heard. Their Written Demand and their individual depositions were made a part of the record considered by Judge Gray. As the opinion of the Oklahoma Supreme Court clearly demonstrates,

the trial court gave them their opportunity to be heard on that motion. As the Oklahoma Supreme Court observed:

> On February 22 and 23, 1999, Defendants took the deposition of Appellants . . . . Appellants' attorney appeared at each of the depositions. Tal's deposition was 129 pages long. After the trial had commenced, Appellants' attorney filed a motion to intervene and for continuance. The trial court, after argument of counsel, considering the depositions of Tal and the other T.A.R. members who had been deposed, and also considering T.A.R.'s Written Demand, denied T.A.R.'s motion to intervene.
>
> * * *
>
> Tal's claims that the failure of the trial court to allow him to intervene and hear his testimony was prejudicial to his rights and those of T.A.R. We note, however, that the trial court considered Tal's 129 page deposition and Tal does not suggest that there are any facts in support of his claim of unlawfulness beyond those contained in the allegations of T.A.R.'s Demand. The trial court read and considered T.A.R.'s Written Demand and the depositions of all of its members. It is obvious that the trial court concluded that the factual allegations in T.A.R.'s Demand and the deposition testimony of its members were insufficient to support T.A.R.'s claim for intervention. For the reasons previously discussed, we agree.

* * *

> The trial court heard T.A.R.'s arguments and read the depositions of its members before ruling on T.A.R.'s motion to intervene.

* * *

> T.A.R. was not entitled to intervene in Oklahoma City's declaratory judgment action because Oklahoma City was representing the rights of all of its taxpayers and was entitled to the presumption that it would do in good faith. T.A.R. failed to overcome this presumption. Further T.A.R. made no claim and the record would not support that Oklahoma City's suit was conclusive or frivolous. Thus, the trial court did not error in denying both T.A.R.'s motion to intervene and its motion for continuance.

It is clear from the foregoing that the Oklahoma Supreme Court observed not just once or twice, but at least four times in its opinion that the trial court had carefully considered TAR's motion to intervene, the Written Demand of January 12, 1999, filed with the City, and the deposition testimony of its members. Plaintiffs now suggest in their response to defendants' motion that the "usual stipulation" made at the beginning of the plaintiffs depositions led the plaintiffs to believe that they would be notified of the trial and would have an opportunity to, mandated by due process, submit their objections and/or rebut any issues. That is an issue, if that is in fact what plaintiffs were led to believe, which the plaintiffs should take up with the lawyer who represented them at that deposition. The fact that their

lawyer, whom the Oklahoma Supreme Court observed, was present at the deposition, chose not to expand the record and submit the information which they now contend entitles them to further inquiry of the issues decided in *Tal I*, should fall on deaf ears.

The plaintiffs, in their brief, try to give justifications for reasons that their proposed petition in intervention in *Tal I* was limited in scope. Such strategic decisions by the plaintiffs' prior counsel, does not constitute a deprivation of procedural due process. The fact that they chose not to tell what they now contend is their whole story, does not mean that they were not given the opportunity to do so. All the due process requires is the opportunity to be heard. The plaintiffs cannot now be heard to turn their decision to hide behind the log into a denial of due process and an opportunity to be heard. Clearly, plaintiffs had their opportunity, they argued their motion to intervene, the trial court clearly considered their deposition testimony and their Written Demand, the fact that they chose not to present all of that which they now contend is the whole story is immaterial to the due process inquiry.

PROPOSITION 6

THE PLAINTIFFS' CLAIMS AGAINST INDIVIDUAL DEFENDANTS WHO WERE NOT MENTIONED AND WHICH CLAIMS WERE NOT INCLUDED IN THEIR DEMAND ARE NOT A PROPER SUBJECT IN THIS *QUI TAM* ACTION

Plaintiffs lack the standing to receive monetary damaged against current and past City officials. Plaintiffs' Written Demand of January 12, 1999, makes no request for such

relief. Therefore, plaintiffs cannot now seek monetary relief against the individuals. Plaintiffs reliance on *State of Oklahoma, ex rel. G.E. Hettel v. Security National Bank and Trust Company in Duncan*, 1996 OK 53, 922 P.2d 600, is misplaced. *Hettel* stands for the proposition that *Qui Tam* statutes are penal statutes in nature as they relate to imposing personal liability on various persons. Therefore, those statutes are to be strictly construed. The statutes provide for possible personal liability of any person who shall direct payment of a fraudulent claim, which is not applicable here, or direct payment of money or transfer of property of the City pursuant to a "unauthorized, unlawful or fraudulent contract or agreement." To be entitled to proceed to prosecute the claims against the individuals, the plaintiffs would be required to show that the contracts at issue were "unauthorized, unlawful or fraudulent." Here, *Tal I* has established that the contracts and agreements in question are in fact lawful, authorized and free from any claims of fraud. Therefore, the prerequisite to any claim of personal liability is missing and the claims against the individuals must therefore be dismissed.

PROPOSITION 7

ARGUMENTS RAISED IN DEFENDANTS' MOTION, AND NOT OPPOSED OR EVEN ADDRESSED IN PLAINTIFFS' RESPONSE ARE DEEMED CONFESSED

In the motion to dismiss filed by these defendants they specifically raise the fact that the City's decision to build a new power plant to provide heating and air conditioning to the refurbished Myriad and the new sports arena were purely a business decision made by the elected City government and that such decision was exclusively within the City's legislative

authority. The plaintiffs have not opposed this aspect of these defendants' motion, and further have not so much as addressed issues relating to the power plant raised in these defendants' motion to dismiss. As a result, that aspect of these defendants' motion to dismiss should be deemed confessed pursuant to Rule 4.e of the Rules of the District Courts.

CONCLUSION

Plaintiffs' response brief and its fourteen (14) page recitation of factual allegations which are outside the scope of the pleadings must fall on deaf ears. The issues which the plaintiffs seek to re-litigate in this case have been fully decided. The plaintiffs efforts to second guess and substitute their business judgment for that of the elected City officials must also be rejected. It is not the function of the judiciary to reevaluate the business decisions made by the legislative branches of government. Our republic is founded on the concept of representative government and the separation of powers.

For these reasons, and the reasons more fully set out above and in the defendants' motion to dismiss, these defendants pray this Court to dismiss this action with prejudice to future filing and without leave to amend the pleadings, for such amendment will not cure the defects pointed out herein.

Dated this 24th day of April, 2000.

/S/ Kieran D. Maye, Jr.
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and DANIEL T. BRUMMITT

[Certificate of Service Omitted in Printing]

Appendix 40

IN THE SUPREME COURT OF THE
STATE OF OKLAHOMA

THE STATE OF OKLAHOMA, ex rel., Moshe Tal, resident taxpayer of The City of Oklahoma City, Oklahoma & Taxpayers Against Ripoffs ("T.A.R."), an association of more than ten resident taxpayers of the City of Oklahoma City, Oklahoma,

Plaintiffs/Appellants,

vs.

Supreme Court
Case No. 94,874

The City of Oklahoma City ("City"), Oklahoma, a municipal corporation; Ronald J. Norick, in his personal and official capacity as former Mayor of the City; Kirk D. Humphreys, in his personal and official capacity as the Mayor of the City; James E. Thompson, in his personal and official capacity as Assistant City Manager & former MAPS Director; William O. West, in his personal and official capacity as City's Municipal Counsel; Daniel T. Brummitt in his personal and official capacity as City's Assistant Municipal Counselor; The Oklahoma City Urban Renewal Authority ("Urban Renewal"), a public body corporate; Tiana P. Douglas, in her personal and official capacity as the Executive Director of Urban Renewal; Stanton L. Young, Fred Jones Hall, J. Larry Nichols, Warren Gardner, and James R. Tolbert III, in their personal and official capacities as Commissioners of the Urban Renewal; William ("Bill") O. Johnstone in his personal and official capacity as the former Commissioner of Urban Renewal; Dan Batchelor, in his personal and official capacity as legal counselor of Urban Renewal; Bricktown Parking Investors, L.L.C., an Oklahoma Limited Liability Company;

Bricktown-TMK/Hogan Parking, L.L.C., an Oklahoma Limited Liability Company; OKC Athletic Club Limited Partnership, an Oklahoma Limited Partnership; BAP-Bricktown, L.L.C., an Oklahoma Limited Liability Company; TMK/Hogan, a Joint Venture; Bricktown TMK/Hogan Entertainment, L.L.C., an Oklahoma Limited Liability Company; Hogan Property Management, L.L.C., an Oklahoma Limited Liability Company; Torchmark Corporation ("TMK"), an Alabama Corporation; Torchmark Development Corporation ("TDC") and TMK Income Properties, L.P. ("TIP") both subsidiaries of TMK; Dan Randolph ("Randy") Hogan; Edwards Theatres Circuit, Inc., a California corporation; Oklahoma Gas & Electric Company, ("OG&E"), an Oklahoma corporation; The Benham Group, an Oklahoma Corporation; and John Doe No. 1-50,

Defendants/Appellees.

PETITION FOR REHEARING

The Plaintiffs/Appellants, Moshe Tal and T.A.R. ("Taxpayers"), respectfully move the Court to modify or amend the language contained in its Decision *State of Oklahoma, ex. rel. Moshe Tal v. The City of Oklahoma City, et. al.*, 2000 OK 70, rendered on September 26, 2000 in this appeal. The Taxpayers are not asking this Court to reconsider its decision affirming the trial court's dismissal of this action. However, they are asking this Honorable Court to reconsider and modify the language used in its opinion to the extent that it either reflects matters outside the appellate record, renders an advisory opinion, used language imposing a chilling effect on the Taxpayers' constitutional right and/or contains inaccurate statements as to the contents of the record.

Appendix 42

PART I

DELETION OF ADVISORY OPINIONS

Courts will not issue advisory opinions. *Post Oak Oil Co. v. Stack & Barnes, P.C.*, 1996 OK 913 P.2d 1311, 1314; *Graham v. Hudgins, Thompson, Ball & Assoc., Inc.*, 1975 OK 540 P.2d 1161; *Rogers v. Excise Bd. of Greer County*, 1984 OK 701 P.2d 754; *PPG Industries, Inc.*, 11 CIT at 303, 660 F. Supp. at 968 (quoting *Flast v. Cohen*, 392 U.S. 83, 96, 88, S.Ct. 1942, 20 L.Ed.2d 947 (1968)). For a court to have jurisdiction to consider a case, "a suit 'must be definite and concrete, touching the legal relations of parties having adverse legal interest. * * * It must be a real and substantial controversy admitting of specific relief through a decree of a conclusive character, as distinguished from an opinion advising what the law would be upon a hypothetical state of facts.'" *North Carolina v. Rice*, 404 U.S. 244, 246, 92, S.Ct. 402, 30 L.Ed.2d 413 (1971) (quoting *Aetna Life Insurance Co. v. Haworth*, 300 U.S. 227, 240-41, 57 S.Ct. 461, 81 L.Ed. 617 (1937)). The fact that an issue presented for review may need to be addressed in the future does not by itself create a live case or controversy. *Nat'l Labor Relations Board v. Globe Security Services, Inc.* 548 F.2d 1115, 1118 (3rd Cir. 1977).

The Court's opinion in this matter contains two advisory opinions. The most significant and far reaching advisory opinion relates to the Taxpayers' Constitutional Rights and is contained in Justice Watt's Opinion Concurring in Part and Dissenting in Part. The other advisory opinion is found in the per curium decision and is expanded upon in Justice Watt's opinion.

A. Advisory Opinion Denying Constitutional Right of Access to the Courts.

The first advisory opinion is contained in Justice Watt's concurring/dissenting opinion. In that opinion Justice Watts states: "I would expect, therefore, that Tal and T.A.R. would engage in no more conduct designed to lengthen this litigation or any other arising from the Bricktown development."

Justice Watt's statement is an advisory opinion. Justice Watts's statement prejudges, as improper, any other actions that Tal or the Taxpayers might hypothetically take in this Court, the district court or any other court which might have jurisdiction over such conflicts. It is an opinion advising what action the court might take based upon a hypothetical set of facts.

i. Chilling Effect of Language on Taxpayers' Constitutional Right of Access to the Courts.

Justice Watt's advisory opinion also has an improper chilling effect on the Taxpayers' constitutional right of access to the courts. Each person is guaranteed a right of access to the courts by virtue of the Fifth and Fourteenth Amendments to the U.S. Constitution and by Article 2, §§ 6 & 7 of the Oklahoma Constitution. *Haggard v. Studie*, 1980 OK CIV APP 610 P.2d 1228,, 1231; *Silver v. Cormier* 529 F.2d 161, 163 (10th Cir. 1976) (citations omitted). This right of access to the courts cannot be infringed upon or burdened. *Haggard v. Studie*, 1980 OK CIV APP 610 P.2d at 1231; *Silver v. Cormier*, 529 F.2d at 163 (citations omitted). In *Silver v. Cormier* the Tenth Circuit held that "[a] public official's threats to a citizen to withhold monies due and owing, should

legal proceedings on an independent matter be instituted, burdens or chills constitutional rights of access to the courts." *Id.* at 163.

Like the threat made in *Silver*, Justice Watts threat of sanctions against the Taxpayers and/or Tal if they "engage in any other conduct designed to lengthen this or any other litigation relating to Bricktown development" violates the Taxpayers' and Tal's constitutional right to access to the courts. Surely, it is improper to include such language in an Opinion of this Court. Thus, Taxpayers respectfully request that Justice Watt amend the language of his opinion to avoid the violation of citizens' constitutional rights.

Moreover, Justice Watt's language creates a quandary for the Taxpayers, Mr. Tal and other litigants in this case as well as other pending appeals and litigation. Justice Watt's statement implies that he views any other filings in this case or others that touch upon the Bricktown Development as sanctionable. As that applies to this litigation, does this mean that Taxpayers were not permitted to file this Motion for Reconsideration? Are the Taxpayers prohibited from contesting the amount of attorneys' fees to be awarded in this matter at the hearing set on December 1, 2000? Are the Taxpayers prohibited from appealing the award of Attorneys' Fees in the trial court?

What about the Hogan Groups' appeal of the denial of sanctions currently pending before this Court? *The State of Oklahoma ex. rel. Moshe Tal v. The City of Oklahoma City, et. al.*, Supreme Court Appeal No. 95271. Justice Watt's admonition that the Taxpayers not engage in any conduct that will cause delay seems to instruct the Taxpayers that they should not file a response to the Petition in Error or an

Answer Brief in the appeal, since the filing of these documents will "delay" the resolution of the appeal.

Also, currently pending before this Court is the appeal of the Condemnation of Tal Technologies Property in Bricktown. *The City of Oklahoma City v. Tal Technologies, Inc.*, Supreme Court Case Number 94,045. The issue in that appeal is the necessity of the taking. The amount of compensation is still awaiting trial in the district court. Are Tal and his corporation prohibited from filing pleadings in that appeal or going forth with the trial on the amount of compensation? Surely such filings and a trial will constitute conduct "lengthening litigation arising from the Bricktown Development."

Lastly, there is a tortious interference with contract suit pending in the District Court brought by Mr. Tal and his partners against Dan Randolph Hogan, TMK/Hogan Joint Venture, Hogan Propert Management, L.L.C. and Bricktown TMK/Hogan Entertainment, L.L.C. *Tal et. al. v. Hogan, et. al.*, Oklahoma County District Court Case Number CJ-2000-5333. In this action Mr. Tal and his partners are seeking to litigate their personal rights to recover for tortious interference against other private citizens. Justice Watt's statement seems to suggest that Mr. Tal and the other plaintiffs in that action are prohibited from pursuing that action to seek redress for harm caused by the defendants.

Justice Watt's advisory opinion unquestionably chills the Taxpayers', Mr. Tals' and other related litigants' constitutional right of access to the courts. The Taxpayers therefore respectfully request that the language of Justice Watt's opinion be modified to remove the improper advisory opinion.

B. Advisory Opinion on the Motion to Strike.

The second advisory opinion is found in the per curium opinion and Justice Watt's concurring/dissenting opinion. This advisory opinion finds that the Taxpayers' Motion to Strike OG&E's Supplement to the Record. The Taxpayers showed the Court that OG&E's Motion was not a proper part of the record on appeal because it had never been ruled upon or considered by the trial court in rendering the judgment. OG&E's Motion was not even filed until after the trial court had dismissed the action pursuant to the City's, the Hogan Group's and Urban Renewal's Motion's to Dismiss. Furthermore, OG&E's Motion was mooted when the Taxpayers' voluntarily dismissed OG&E and the other remaining defendants because the Taxpayers believed that no viable action against those defendants remained after the dismissal of the City. Similarly mooted was the pending Motion to Dismiss filed by BAP Parking L.L.C. and the Motion for Summary Judgment filed by Torchmark Corporation. *See Trial Court Docket 4/10/00 and 5/02/00.* Unlike OG&E, neither BAP or Torchmark attempted to supplement the appellate record with their motions.

The Taxpayers filed their Motion to Strike on August 28, 2000. OG&E's Response was due on September 15, 2000. However, OG&E still had not filed an Answer to the Motion to Strike by the time this Court filed its decision in this matter on September 26, 2000. Apparently OG&E had no objection to having their Supplement stricken from the Record on Appeal.

Despite the lack of opposition to the Motion to Strike, this Court not only denied the Motion, but went so far as to ascribe some imporper motive to the Taxpayers' reason for

filing the Motion to Strike. The Court and Justice Watt, opine, hypothetically, that the Taxpayers were seeking to strike OG&E's supplement so that the Taxpayers could file another appeal in this matter. There are no facts whatsoever for such a conclusion by this Court.

The Court's and Justice Watt's discussions of the reasons for denying the Taxpayers' Motion to Strike, violate the proscription against rendering advisory opinions.[1] The Opinions are based upon the Court's and Justice Watt's hypothetical belief that the Taxpayers filed the Motion to Strike in an attempt to engineer another appeal in this matter. Using this hypothetical motive as a basis, the Court and Justice Watt, hypothesize and render an advisory opinion, that if such an appeal were filed, it would be improper. However, no such appeal has been filed, no party has suggested that such an appeal might be possible, and the Taxpayers cannot even imagine what sort of appeal might be brought.

Without question, this Court's findings that such an appeal would be improper, when no such appeal has been filed, is "an opinion advising what the law would be upon a hypothetical state of facts." "The fact that an issue presented for review may need to be addressed in the future does not by itself create a live case or controversy." *Nat'l Labor Relations Board v. Globe Security Services, Inc.*, 548 F.2d

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[1] The denial of the Motion to Strike also violates and overrules this Court's own precedent and rules regarding the contents of the Record and matters that will be considered on appeal. *See Dyke v. St. Francis Hospital, Inc.*, 1993 OK 114 ¶ 11, 861 P.2d 295, 299-300 ("a party cannot supplement the record on appeal by injecting into it material *that was not before the trial court* at the decisional stage of the case").

1115, 1118 (3rd Cir. 1977). While this Court may deny the Motion to Strike, it is improper for it to render an advisory opinion on any hypothetical appeal this Court believes the Taxpayers might attempt to bring.

PART II

MODIFICATION OF INACCURATE STATEMENT REGARDING CONTENTS OF RECORD.

In its Opinion, this Court has stated that "[n]owhere in their brief did Tal and T.A.R. attempt to explain why they had standing to prosecute a *Qui Tam* action under their Written Demand, although we had held in *Tal I* that they lacked standing to do so."

While this Court may not have found Taxpayers' discussion or citation of authority on standing to be persuasive or correct, it is inaccurate to state that Tal and T.A.R. did not *attempt to explain* why they had standing to prosecute a *Qui Tam* action despite the holding in *Tal I*.

In the Statement of Facts, the Taxpayers quote *Tal I* where it is stated that:

> There is but a single, narrow issue in this case: Did the trial court err in denying T.A.R.'s motions to intervene and for continuance? *City of Oklahoma City v. Oklahoma City Urban Renewal Authority*, 1999 OK 71 ¶ 14. 988 P.2d 901,905.

Plaintiffs' Brief in Opposition to Defendants' Motions to Dismiss, Statement of Fact No. 38, pg 13.

No where in *Tal I* did this Court hold that the Taxpayers would not have standing to bring a Qui Tam in a separate action after the conclusion of the Declaratory Judgment. To so hold would have constituted an advisory opinion since the issue was not before the Court. The narrow scope of the *Tal I* decision coupled with relevant authority, lead the Taxpayer's to explain, in Statement of Fact No. 39, their belief that this Court's "holding that the Taxpayers did not have a right to intervene is not co-extensive with a finding that T.A.R. is precluded from bringing a Qui Tam following the resolution of the Declaratory Judgment." *Plaintiffs' Brief in Opposition to Defendants' Motions to Dismiss, Statement of Fact No. 39, pg 13.*

Although not cited in their Brief, Taxpayers were lead to this belief by, *inter alia*, the language in the Legislative Commentary to Federal Rule of Civil Procedure 24, following the 1966 amendments, wherein it is explained that even though a class member is denied intervention on the grounds that representation is adequate, the class member may be permitted to show in a subsequent action that the representative party did not, in fact, adequately represent the class member and, therefore, the class member is not bound. FRCP 24 (a)(2) Intervention, Commentary to 1966 Amendments, *citing Hansberry v. Lee*, 311 U.S. 32 (1940) (Taxpayers similarly cited *Hansberry v. Lee* for the proposition that it is a violation of due process to preclude a plaintiff from bringing an action based upon a decision in a previous action brought by a representative party who did not adequately represent the plaintiff's interests). *See Plaintiffs' Brief in Opposition to Defendants' Motions to Dismiss*, pg 15.

The Taxpayers believed, and attempted to state, that they had a right to establish standing based upon a showing of

the inadequacy of representation. Thus, they concentrated their efforts to show standing from this perspective in the Statement of Facts, the attached evidence and in Proposition IV of the their Brief.

The Taxpayers will not ask this Court to reconsider their decision that Taxpayers had no standing to bring this action. However, they respectfully ask the Court to amend the language in the opinion stating that "*[n]owhere* in their brief did Tal and T.A.R. *attempt* to *explain* why they had standing to prosecute a *Qui Tam* action under their Written Demand, although we had held in *Tal I* that they lacked standing to do so." (Emphasis added) While the Taxpayers' "attempt" to explain their position on standing was obviously not clear to this Court, and was ultimately unsuccessful, the attempt was made.

PART III

DELETION OF REFERENCES TO MATTERS OUTSIDE THE APPELLATE RECORD.

On consideration of an appeal, the appellate court is strictly limited to the record before it. *Fent v. Oklahoma Natural Gas Co., a Div. of Oneok Inc.*, 1994 OK 108, fn 13 898 P.2d 126, 136. Unlike the trial courts, an appellate court may not take judicial notice of any material on file below, which is not incorporated into the record for review. *Fent v. Oklahoma Natural Gas Co., a Div. of Oneok, Inc.*, 1994 OK 108, fn 10, 898 P.2d at 136.

In his separate opinion, Justice Watt has taken notice of and commented upon matters not within the appellate record. "In this connection, I note that the trial court has

granted appellees' motions for sanctions and attorneys' fees incurred as a result of Tal and T.A.R.'s conduct in having filed the suit in the first place." *T.A.R. v. Oklahoma City et. al.*, 2000 OK 70 ¶ 2 (Watt, J. opinion concurring in part and dissenting in part).[2] "On this score I observe that motions for sanctions for Tal and T.A.R.'s conduct in this case are presently pending and I would have granted appellants leave *sua sponte* to file additional motions for sanctions." *T.A.R. Oklahoma City et. al.*, 2000 OK 70 ¶ 2 (Watt, J. opinion concurring in part and dissenting in part).

The Defendants' Motions for Attorneys' Fees were not part of the record on appeal. Nowhere in the record are the Motions for Attorneys' Fees or the granting of such Motions, mentioned or referenced in any manner.

Because the Motions for Attorneys' Fees are matters outside of the Record and are not cognizable on appeal, the Taxpayers respectfully request that the language referring to those Motions and their disposition in the lower court, be removed from the Opinion.

CONCLUSION

To the extent the Court's and Justice Watt's Opinions reflects matters outside the appellate record, renders an advisory opinion, uses language imposing a chilling effect on

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[2] This statement is partially inaccurate in that the Motions for Sanctions filed by the Defendants were denied at a hearing on June 23, 2000. It is accurate that the Motions for Attorneys' Fees were granted in favor of the City, Urban Renewal and the Hogan Group. However, a Motion for Reconsideration of the Award of Attorneys' Fees is currently pending in the District Court.

the Taxpayers' and others' constitutional rights and/or contains inaccurate statements as to the contents of the record Taxpayers respectfully ask this Honorable Court and the Honorable Justice Watt, to remove or modify those portions of the Opinions.

Respectfully submitted,

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In the
Supreme Court of the United States

THE STATE OF OKLAHOMA ex rel. Moshe Tal and Taxpayers Against Ripoffs ("T.A.R."), an association of more than ten resident taxpayers of the City of Oklahoma City, Oklahoma,

Petitioner,

vs.

THE CITY OF OKLAHOMA CITY, et al.,

Respondents.

On Petition For A Writ of Certiorari
To The Supreme Court of Oklahoma

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Did the Oklahoma courts violate the Due Process Clause by holding as a matter of Oklahoma law that individual taxpayers who appeared at trial through counsel and were given an opportunity to argue for intervention under the Oklahoma *qui tam* statute in a declaratory judgment action concerning the enforceability of downtown redevelopment agreements did not have standing to prosecute an action on behalf of the state for a bounty because the City of Oklahoma City, the governmental entity upon which the individuals had served a written demand, had acted in good faith by instituting the declaratory judgment action?

CORPORATE DISCLOSURE STATEMENT

Oklahoma Gas and Electric Company states that it is a wholly-owned subsidiary of OGE Energy Corporation, a public company.

The Benham Group states that it is a wholly-owned subsidiary of Atkins Benham, Inc., which is a wholly-owned subsidiary of Atkins Benham US Holdings, Inc., which is wholly-owned subsidiary of W.S. Atkins, P.L.C., a public company.

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STATEMENT OF THE CASE

Overview of the Re-Development of Downtown Oklahoma City. Like many American cities, Oklahoma City has experienced a deterioration of its downtown area over the last several decades. Although there has been significant economic development of outlying areas of the city and its suburbs, much of the infrastructure in the city's core has been underutilized, abandoned, or even demolished. In 1993, the citizens of Oklahoma City decided that this deterioration should be reversed. They voted in a temporary one-cent increase in the sales tax in order to support public and private investment in the downtown area, such as a new library, a new art museum, a new baseball stadium, renovations to the convention center and performance center, and a variety of improvements in a downtown entertainment zone called "Bricktown."

Under this program, known as the "Metropolitan Area Projects" program, or "MAPS," the Oklahoma City Council enacted a redevelopment plan for Bricktown that involved conveying land to the Oklahoma City Urban Renewal Authority ("OCURA"), which would in turn sell the land to developers for at least fair market value and provide proceeds to the city. Formally approved on July 24, 1997, the redevelopment plan contemplated awarding significant contracts to a private developer who would carry out specific improvements in Bricktown, including providing parking for the Bricktown area and the adjacent minor-league baseball stadium.

The Oklahoma City Council's Deliberations and Vote. Petitioner Moshe Tal ("Tal") hoped that he would be that private developer. He submitted proposals to the city council in conjunction with other investors, as did Bricktown TMK/Hogan Entertainment, L.L.C., and various affiliated entities (the " Hogan Respondents").

The city council deliberated over the competing development proposals for two years. It encouraged extensive review of the proposals through public notices, meetings, and hearings. A significant minority of the council argued for Tal's proposals, but the majority

favored the plan offered by the Hogan Respondents. The ultimate votes on the proposals were close – on one major component, only five of the nine council members voted for the Hogan plan. On July 21, 1998, the city approved the last of three redevelopment agreements involving the Hogan Respondents and OCURA relating to improvements to Bricktown.

The Oklahoma *Qui Tam* Statute and Tal's *Qui Tam* Demand. Tal, however, was unwilling to accept the city council's thorough deliberations. On January 12, 1999, he delivered to the city a written demand concerning several MAPS-related transactions. Among other things, Tal demanded that the city declare the redevelopment agreements void and that it institute proceedings against the Hogan Respondents and OCURA to recover proceeds relating to their agreements. In addition to Tal, thirteen individuals signed the petition on behalf of an organization calling itself "Taxpayers Against Rip-Offs" ("TAR").[1]

Tal purported to make this demand pursuant to Oklahoma's *qui tam* statutes. *See* 62 Okla. Stat. §§ 372 & 373; App. at 44-45. Under those statutes, a citizen may bring a suit on behalf of a governmental entity for "the recovery of any money or property belonging to" that entity, but only after the entity has refused, failed, or neglected to institute proceedings for the recovery of its money or property after being served with a written demand by ten resident taxpayers. Section 373 provides that the money or property subject to the written demand must have been transferred by an officer of the governmental entity pursuant to an "unauthorized, unlawful, fraudulent, or void contract." Only in the event that the entity fails to pursue the demand can a citizen bring suit "in the name of the State of Oklahoma as plaintiff" and recover half of the recovery "as a reward."

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[1] Tal is the driving force behind TAR. Indeed, when Tal was out of town at the beginning of the trial in *Tal I*, TAR's counsel claimed that no one else had the information necessary to support TAR's motion to intervene. Thus, references to Tal throughout this Opposition also serve as references to TAR.

The City's Response: The Declaratory Judgment Action (*Tal I*). In response to Tal's demand, the city brought a declaratory judgment action in the District Court for Oklahoma County against the Hogan Respondents and OCURA on January 26, 1999. Contrary to Tal's assertion that the city's action "did not contain any mention of the claims relating to conflicts of interest," *see* Petition at 7, the city's petition attached Tal's written demand, which included allegations of conflicts of interest, as an exhibit and asserted that "[a]n actual controversy has arisen concerning the validity of the Agreements because of the allegations contained in the Written Demand." The city requested that, should the court find the redevelopment agreements invalid as wrongful transfers, it issue a declaration that the agreements are void and order the defendants to return the money and property involved in the agreements to the city. The Hogan Respondents filed a counterclaim against the city and a cross-claim against OCURA, both seeking an injunction requiring performance under the redevelopment agreements.

Tal's Petition before this Court suggests that the city, the Hogan Respondents, and OCURA conducted the declaratory judgment action behind Tal's back. Nothing could be further from the truth. Tal received copies of the city's petition and the responsive pleadings. Tal and the other taxpayers who signed the written demand – all represented by counsel – sat for depositions relating to their allegations in the weeks leading up to the trial. Everyone involved in the matter was aware that the city needed to prosecute its claim quickly because investors in Bricktown would not be willing to commit significant funds to the development of Bricktown until the litigation that Tal had stirred up was resolved. Thus, on February 3, 1999, the parties stipulated that the case should go to trial on March 1. And, of course, the trial date was a matter of public record.

Tal's Motion to Intervene. Tal's attempt to create the impression that he was surprised when the case went to trial springs from the fact that he and his counsel presented a less-than-impressive motion to intervene on the morning of trial. Tal's counsel asked for the proceedings to be delayed on the grounds that Tal was in Puerto Rico. The court refused to postpone the case for Tal's convenience, but it did take the time to hear his counsel's argument for intervention. Tal's

counsel declined to offer evidence in support of his motion. He indicated that he had nothing to add beyond the information in the written demand and the depositions of Tal and the other taxpayers. After considering the argument, the written demand, and the depositions, the trial court denied the m otion.

The court then conducted the trial and entered a declaratory judgment that the redevelopment agreements are valid and enforceable.

Tal's Appeal of Denial of Intervention. Tal appealed the denial of his motion to intervene to the Oklahoma Supreme Court.[2] His brief argued that the trial court abused its discretion by failing to grant him permissive intervention. It made no mention of intervention of right.

Taking the case on an expedited basis, the Oklahoma Supreme Court affirmed in *The City of Oklahoma City v. Oklahoma City Urban Renewal Authority* ("*Tal I*"), 988 P.2d 901 (Okla. 1999). It held that Tal lacked standing to intervene under the Oklahoma *qui tam* statute. "Taxpayers may intervene in an action brought by a public body," the court explained, "only if the public body fails to respond to a written demand with action taken in good faith." 988 P.2d at 906, App. at 27 (citing *Braly v. Ford*, 116 P.2d 988 (Okla. 1941)). It held that "there is nothing in the record to reflect that Oklahoma City acted in bad faith. Its actions were taken under the glare of public scrutiny and were resisted by a significant minority of the City Council." *Id.* There was no dissent.

Tal's Further Litigation: *Tal II*. Before Tal delivered his written demand to the city concerning Bricktown, he attempted to conduct a similar effort to frustrate the operation of the new baseball stadium adjacent to Bricktown. On September 9, 1998, within two months of the last redevelopment agreement with the Hogan Respondents, Tal

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[2] Under Oklahoma procedure, all civil appeals go directly to the Oklahoma Supreme Court. That court can choose to retain jurisdiction or to assign the appeal to an intermediate appellate court. The Oklahoma Supreme Court retained jurisdiction of all appeals brought by Tal relating to the redevelopment of downtown Oklahoma City.

delivered to the city a written demand that it rescind contracts that it had entered through the Oklahoma City Public Property Authority with the Oklahoma City Athletic Club relating to the ballpark. According to Tal, the transactions were void for lack of consideration. He then actually filed a *qui tam* lawsuit and demanded monetary damages from the city. On October 16, 1998, the city responded to the demand by filing a declaratory judgment action against the Oklahoma City Athletic Club. The city also moved to dismiss Tal's claims. Tal argued that he should be permitted to proceed against the city because the city's declaratory judgment action was not a sufficient response to his demand. The trial court dismissed Tal's claim.

On October 26, 1999 – after handing down its opinion in *Tal I* – the Oklahoma Supreme Court affirmed dismissal of Tal's claim concerning the ballpark agreements in *State of Oklahoma ex rel. Tal v. Norick* ("*Tal II*"), 991 P.2d 999 (Okla. 1999). The court did not feel compelled to explain at length that because the city had instituted a declaratory judgment action, Tal did not have standing to pursue a *qui tam* action. It stated simply:

> Although Tal and T.A.R. sought to intervene in the City's action in *Tal I* and did not prosecute an independent *qui tam* action, as they have done here, the plaintiffs' theories in support of intervention in *Tal I* were substantially similar to those presented by plaintiffs here in support of their claimed right to prosecute a *qui tam* action. . . . The similarity between the record presented here and the record we considered in *Tal I* convinces us that there is no reason to restate here our reasoning in *Tal I*. We therefore hold that the trial court did not err in concluding that the *qui tam* action was prematurely brought.

Tal II, 991 P.2d at 1001, App. at 37-38. Again, there was no dissent.

Tal's Still Further Litigation: *Tal III*. Unbowed and still disgruntled, Tal brought yet another action on March 15, 2000. This time he sued the city, OCURA, the Hogan Respondents, and a host of other entities and individuals in a purported *qui tam* action based on his written demand in *Tal I*. Among these other defendants were

Oklahoma Gas and Electric Company ("OG&E") and The Benham Group, which were involved in a separate MAPS-related project involving an on-site heating and cooling system for the enlarged downtown convention center and sports arena. Tal's Petition alleged that the city's decision to discontinue service from a district heating and cooling company in favor of installing an on-site heating and cooling system constituted an illegal contract and an unlawful expenditure of MAPS funds.

The trial court dismissed as to all defendants, and Tal once again took his case to the Oklahoma Supreme Court. In *State of Oklahoma ex. rel. Tal v. The City of Oklahoma City* ("*Tal III*"), 19 P.3d 268 (Okla. 2000) (*per curiam*), the court once again explained that Tal does not have standing to prosecute a *qui tam* action under the Oklahoma statute. *See Tal III*, 19 P.3d at 272, App. at 10 ("We affirm the trial court's order dismissing Tal and T.A.R.'s action because Tal and T.A.R. lack standing to prosecute this action concerning the Bricktown project.").

This time, however, there was a dissent. Justice Watt concurred in the holding that Tal lacked standing, but he disagreed with "the majority's failure to address what is to me quite clear: that Tal and T.A.R.'s conduct in filing and prosecuting this action is likely sanctionable." *Id.*, App. at 10 (Watt, J., dissenting in part). He noted that Tal's "serial lawsuits and appeals" have "hindered the Bricktown project, including, according to appellees, the loss of investors who have refused to participate only because of this constant litigation." *Id.*, App. at 10 (Watt, J., dissenting in part). Based on the frivolous appeal, he would have granted leave *sua sponte* for defendants such as OCURA and the Hogan Respondents to file sanctions motions beyond those filed in the trial court relating to Tal's bringing the *Tal III* suit in the first place. *See id.* at 273, App. at 12 (Watt, J., dissenting in part).

On December 12, 2000, the trial court in *Tal III* ordered Tal to pay the defendants $185,000 in attorneys' fees for bringing the purported *qui tam* suit in bad faith.

REASONS FOR DENYING A WRIT OF CERTIORARI

I. Tal Has Waived His Right to File this Petition.

A. Tal Grounded His Argument Before the Oklahoma Supreme Court on Permissive Intervention, Not Intervention of Right.

According to Tal's Petition, he had a right – indeed, a constitutional right – to intervene in *Tal I*. He frames the issue as whether the Oklahoma Supreme Court violated the Constitution by enforcing the preclusive effect of its earlier decision "denying intervention of right on the grounds that the taxpayers' rights are adequately represented." Petition at 13. His Petition makes no argument based on permissive intervention. In listing the constitutional and statutory provisions involved in his Petition, he includes only the subsection of the Oklahoma intervention statute dealing with intervention of right.[3] *See also* Petition at 18 (citing the standard for intervention of right and failing to cite the standard for permissive intervention).

But Tal failed to argue intervention of right when he appealed to the Oklahoma Supreme Court in *Tal I*. That court noted: "Tal and T.A.R. do not claim that T.A.R. was entitled to intervene as of right. Their claim is that the trial court erred in not allowing T.A.R. to intervene on a permissive basis under § 2024.B.2." *Tal I*, 988 P.2d at 905, App. at 26-27.

Tal insists that he has preserved his right to argue intervention of right in this Court. *See* Petition at 8 n.2. He claims that he raised the issue in the Oklahoma Supreme Court by including it in his list of issues to be raised on appeal, filed at the outset of the Oklahoma appellate process. But Tal does not deny that he failed to include any

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[3] Section 2024 of the Oklahoma Pleading Code parallels Rule 24 of the Federal Rules of Civil Procedure. *See* App. at 45-46. Tal lists § 2024.A, which addresses intervention of right, as legal authority; he does not list § 2024.B, which addresses permissive intervention. *See* Petition at 5.

argument concerning intervention of right in his appellate brief in *Tal I*. Under Oklahoma Supreme Court rules, a party waives any argument that it fails to brief. *See DLB Energy Corp. v. Oklahoma Corp. Comm'n*, 805 P.2d 657, 659 n.6 (Okla. 1991) ("Although DLB Energy argued in its petition in error that exclusion of the evidence was error, it did not brief the issue. The question is waived."). In any event, his assertion that the Oklahoma Supreme Court was "mistaken" in finding waiver, *see* Petition at 8 n.2, rings hollow at this late date. Tal's petition for rehearing in *Tal I* failed even to attempt to explain how the finding of waiver was a "mistake."

B. Tal's Challenge to the Oklahoma Supreme Court's Holding in *Tal I* Is More than a Year Too Late.

Tal vigorously prosecuted the denial of intervention in *Tal I*. The Oklahoma Supreme Court received full briefing on the issue and on August 30, 1999, issued an opinion for publication addressing Tal's arguments. The court denied rehearing on September 30, 1999. If Tal believed that denial of intervention raised a federal constitutional issue, he had an obligation to petition this Court for certiorari within 90 days of denial of rehearing in *Tal I*. Indeed, his counsel stated on the record in the trial court that he was prepared to seek a writ of certiorari from this Court in the event the Oklahoma courts refused to let him proceed. He chose not to do so.

Tal's indirect challenge to the intervention ruling through this challenge to the subsequent opinion re-affirming the reasoning of *Tal I* is an impermissible attempt to extend indefinitely this Court's deadline for filing a petition for certiorari.

II. The Oklahoma Supreme Court's Decision in *Tal I* Was Based on Lack of Standing, Not Adequacy of Representation.

Tal purports to challenge the preclusive effect of the Oklahoma Supreme Court's finding "that the government is 'adequately representing' the taxpayers' interests." Petition at *i*. The Oklahoma Supreme Court, however, did not affirm denial of intervention in *Tal I* because the city and its attorneys adequately represented Tal and the taxpayers. Rather, it affirmed because Tal and the taxpayers lacked

standing under the Oklahoma *qui tam* statute. Under that statute, Tal had the burden of overcoming the presumption that the city acted in good faith in responding to his demand. *See Braly v. Ford*, 116 P.2d 988, 990 (Okla. 1941). The trial court found that he failed to overcome that presumption, and after reviewing the record, the Oklahoma Supreme Court held that this finding was not an abuse of discretion. *See Tal I*, 988 P.2d at 906, App. at 27.

The good-faith standard is significantly different from the adequacy-of-representation standard upon which Tal grounds his entire Petition. At bottom, it is a safeguard against public corruption. It is not designed to protect the rights of individual litigants or groups. To carry his burden under the good-faith standard, Tal would have had to make a "showing of fraud or unlawful activity." *Id.* As the argument in Tal's Petition seems to concede, there was no such evidence presented in the Oklahoma courts:

> [T]here is nothing in the record to reflect that Oklahoma City acted in bad faith. Its actions were taken under the glare of public scrutiny and were resisted by a significant minority of the City Council. That the disagreements among Council members were resolved in a way that Tal and the other T.A.R. members do not like does not support in any way T.A.R.'s claim that the Development Agreements were either fraudulent, unlawful, or otherwise inadequate.
>
> That a more attractive deal for Oklahoma City might have been made, as T.A.R. asserts it could and should have been made, is not for this Court's consideration. Such issues were for the City Council and the City Council resolved them. There being no showing of fraud or unlawful activity here, T.A.R. ***lacks standing*** to attack the City Council's decisions.
>
> . . .
>
> Because we conclude that Moshe Tal's petition for intervention was correctly denied, he stands excluded as a party litigant below and ***has no standing*** to tender for our review any errors made by the trial court.

Id. (emphasis added). *See also Tal III*, 19 P.3d at 271, App. at 7 ("Nowhere in their brief did Tal and T.A.R. attempt to explain why

they had standing to prosecute a *Qui Tam* action under their Written Demand, although we had held in *Tal I* that they lacked standing to do so.").

The court's holding in *Tal I* reflects the nature of *qui tam* actions, which permit citizens to stand in for the state as plaintiffs in specified circumstances but do not give citizens any cause of action of their own. If they satisfy the statutory requirements – in this case, proving that the city acted in bad faith – then they have standing. But if they do not, they have no legal rights to assert. As the Ninth Circuit concluded in *Cedars-Sinai Medical Center v. Shalala*, 125 F.3d 765 (9th Cir. 1997), a citizen never has an absolute right to intervene in a *qui tam* action. Because "a *qui tam* plaintiff by definition asserts not his own interests, but only those of [the government]," it is impossible for him to establish that the parties already present in the lawsuit do not adequately represent him. 125 F.3d at 768 (citing cases). Thus, Tal had no legal rights that the city or its attorneys were obligated to press on his behalf.

Tal suggests that he was entitled to intervene in the city's action because the city had a conflict of interest. He attempts to link this alleged conflict of interest to the type of intra-class conflict that can justify overturning a judgment in a class action. *See, e.g.*, Petition at 10-11 ("[T]he Taxpayers contended that under *Hansberry v. Lee* the judgment in the City's action did not bar the Taxpayers' action because the City had a conflict of interest with Taxpayers and, thus, did not adequately represent them at trial."). This conflict-of-interest theory has no basis in *qui tam* law, however. When taxpayers deliver a written demand that the government investigate the allegedly improper disposition of money or property, the governmental body will almost always face a conflict of interest. Like all potential *qui tam* plaintiffs, Tal was asking the government to investigate itself. The Oklahoma statute limits *qui tam* litigation based on a conflict of interest by permitting *qui tam* suits only on a showing that the government has investigated itself in bad faith. Under Tal's theory, by contrast, there would be no limit on *qui tam* suits, for every group of taxpayers who delivered a demand would be entitled to intervene based on an unproven suspicion that the government has succumbed to a conflict of interest. Fortunately, there are clear limitations on *qui tam*

plaintiffs. Under Oklahoma law, bounty hunters such as Tal simply do not have standing to sue on behalf of the government based on the mere possibility that the government will not investigate itself adequately.

By framing the question before this Court in terms of adequacy of representation and governmental conflict of interest rather than standing, Tal raises an issue that simply was not before the trial courts or the Oklahoma Supreme Court in *Tal I* or *Tal III*.[4]

III. Denial of Intervention Under the Oklahoma *Qui Tam* Statute Does Not Raise a Question of Federal Due Process Law.

A. *Hansberry v. Lee* Concerns the Due Process Rights of Absent Parties in Representative Actions Who Are Real Parties in Interest and Mount a Collateral Attack.

Tal's Petition relies almost exclusively on this Court's opinion in *Hansberry v. Lee*, 311 U.S. 31, 61 S. Ct. 115 (1940). According to Tal, the *Hansberry* Court held that "res judicata arising out of a representative action cannot bind a non-party where the non-party's interests were not adequately represented." Petition at 13.

This reliance is misplaced. The pivotal words in Tal's formulation of the holding in *Hansberry* are "representative action" and "non-party." Without any grounding in the rationale of *Hansberry*, Tal is

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[4] Variations on the phrase "adequacy of representation" did find their way into the Oklahoma Supreme Court's opinions in *Tal I* and *Tal III*. But the reasoning in the opinions indicates that the Oklahoma Supreme Court was focused on the good-faith standard and the question of standing, not the question of whether the city was an adequate legal representative of Tal's personal interests. *See, e.g.*, *Tal III*, 19 P.3d at 271-72, App. at 9 ("In *Tal I* we held that Tal and T.A.R. lacked standing to prosecute a *Qui Tam* action because they failed to make a showing that the City was not adequately representing their interests."). To the extent that adequacy of representation is relevant in this case, it is adequacy of political representation – i.e., the absence of public corruption – and not adequacy of legal representation, such as in cases flowing from *Hansberry*. *See infra* Part III.C.

attempting to sweep all actions by the state within the phrase "representative action," and he is further asking this Court to apply *Hansberry*'s due, process protections to all citizens, regardless of their personal interests in the "representative" action. This would effectively eliminate any preclusive effect of judgments in civil actions brought by governmental bodies.[5] More to the point, it would contradict this Court's careful holding in *Hansberry*. Under *Hansberry*, when a court enters a judgment ***in a class action*** that would otherwise preclude a ***non-named class member*** from further litigation, that non-named class member may nevertheless prosecute a collateral attack on the judgment ***if he was not involved in the earlier litigation*** and can show that the class representatives did not protect his personal interests adequately.

The *Hansberry* case concerned a collateral challenge brought by African-American land-owners to a judgment in a class action decreeing the enforceability of a racially-restrictive land covenant. The trial court had held that even though the earlier class-action decree was based on "a false and fraudulent stipulation of the parties," 311 U.S. at 38, 61 S. Ct. at 116, the judgment precluded further litigation by any members of the class, even those who were the targets of the racially-restrictive covenant. The Illinois Supreme Court found that the stipulation on which the covenant's validity was based was untrue, but it nevertheless affirmed the holding that there could be no collateral attack.

This Court reversed on due-process grounds and allowed the African-Americans to challenge the validity of the restrictive covenant. The *Hansberry* opinion did not hold, however, that a ***non-party*** has a due-process right to challenge a final judgment whenever it believes that the judgment implicates its interests and that the party whose side it favored failed to prosecute the case vigorously. Indeed, this Court

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[5] Indeed, it is unclear how Tal would limit his due-process principle to civil governmental actions. Its logic extends to judgments in criminal actions in which citizens assert that the prosecution failed to represent the people adequately, especially if the inadequate representation resulted in wasted tax dollars, such as a failure to win monetary criminal penalties.

emphasized that collateral attacks such as the one in *Hansberry* should be permitted only in extraordinary circumstances and that the *Hansberry* principle should only rarely have an effect on preclusion rules established by the states:

> Here, as elsewhere, the Fourteenth Amendment does not compel state courts or legislatures to adopt any particular rule for establishing the conclusiveness of judgments in class suits; nor does it compel the adoption of the particular rules thought by this court to be appropriate for the federal courts. With a proper regard for divergent local institutions and interests, this Court is justified in saying that there has been a failure of due process ***only*** in those cases where it cannot be said that the procedure adopted, fairly insures the protection of the interests of ***absent parties who are to be bound by it.***

Id. at 42, 61 S. Ct. at 118 (emphasis added) (citations omitted).

Thus, the petitioners in *Hansberry* were entitled to due process exclusively by virtue of being absent parties to the earlier class action. Indeed, the Court stated explicitly that its holding was based in part on "the relationship between the parties present and those who are absent." *Id.* at 43, 61 S. Ct. at 119. *See also id.* at 44, 61 S. Ct. at 119 (referring to "the protection of the rights of ***absent parties*** which due process exacts" (emphasis added)); *id.* at 45, 61 S. Ct. at 120 (referring to "[t]he doctrine of representation of ***absent parties*** in a class suit" (emphasis added)). Unlike this case, in which Tal claims rights merely as an unrepresented "non-party taxpayer," *see, e.g.*, Petition at 14, the petitioners in *Hansberry* were "parties who [were] represented though absent." 311 U.S. at 43, 61 S. Ct. at 119. And unlike this case, in which the city made no claim to serve as Tal's legal representative and cannot seek to make the ruling in *Tal I* binding on him personally, in *Hansberry* "the members of the class who [were] present [were], by generally recognized rules of law, entitled to stand in judgment for those who [were] not." *Id.*

Tal's Petition cites a number of cases for due-process rules in the same family as the *Hansberry* rule. Not surprisingly, all of these cases involved class actions. For example, Tal cites *City of Tacoma v.*

Taxpayers of Tacoma, 357 U.S. 320, 78 S. Ct. 1209 (1958), for the proposition that "a judgment for or against a governmental body in an action brought by the governmental body on behalf of the public as a general rule is binding and conclusive on all residents, citizens, and taxpayers with respect to matters adjudicated which are of general and public interest." Petition at 17. Tal neglects to mention that the binding effect of the judgment in *Tacoma* was due to the fact that the city certified a class of defendant taxpayers before obtaining judgment. *See* 359 U.S. at 329, 78 S. Ct. at 1215 ("As required by [Washington] statutes the court named representative taxpayers of Tacoma as class defendants and also appointed their counsel."). Similarly, *Richards v. Jefferson County*, 517 U.S. 793, 803, 116 S. Ct. 1761, 1768 (1996), *see* Petition at 1, involved taxpayers who brought a class action based on an allegedly unconstitutional attem pt to "levy personal funds."

Had the petitioners in *Hansberry* not been parties by virtue of the class-action device, there would have been no due-process right to protect. So far as we are aware, the *Hansberry* rule has never been applied in the context of either state or federal *qui tam* actions. *See also In re Real Estate Title & Settlement Services Antitrust Litig.*, 869 F.2d 760, 769 (3d Cir. 1989) ("Ever since *Hansberry v. Lee* was decided in 1940, collateral attacks have been considered to be a necessary part of ***the class action scheme***." (emphasis added)). Indeed, it appears that no court has ever seen fit to entertain the question of whether those who are not parties to *qui tam* actions may bring collateral challenges to denials of intervention on a theory of inadequate representation. There are at least two simple reasons for this. First, litigants who move to intervene in *qui tam* actions are not absent parties. Second, a *qui tam* action is not a "representative action" within the meaning of *Hansberry*. Both reasons defeat Tal's contention that he should be permitted to re-visit *Tal I*'s holding that he had no standing to intervene.

B. Because Tal Was Not an Absent Party at the Trial in *Tal I*, He Has No Due Process Right to Mount a Collateral Attack.

The *Hansberry* rule applies only when an adjudication takes place without any participation by a class member who would otherwise be bound by the judgment. It does not apply when a class member, even if un-named, is aware of the litigation and plays some role in the proceedings.

As this Court put it in *Hansberry*, "[i]t is familiar doctrine of the federal courts that members of a class not present as parties to the litigation may be bound by the judgment where . . . they actually participate in the conduct of the litigation in which members of the class are present as parties." 311 U.S. at 43, 61 S. Ct. at 118. *See also Laskey v. International Union, UAW*, 638 F.2d 954, 957 (6th Cir. 1981) ("Since appellants had the opportunity to object to the legal representation at the prior [class] settlem ent hearing[,] . . . appellants are collaterally estopped from now asserting that the legal representation was not adequate . . . ."); *In re Antibiotic Antitrust Actions*, 333 F. Supp. 296, 297 (S.D.N.Y. 1971) (rejecting a *Hansberry* attack on a class settlement where absent class members who had not opted out appeared through counsel, even though they alleged "that the class representative – the Attorney General of the Commonwealth of Virginia – had an interest antagonistic to them and other members of the class"); 13 WRIGHT & MILLER, FEDERAL PRACTICE & PROCEDURE § 4451 ("The most direct basis for applying preclusion against a nonparty rests on actual participation in prior litigation. A nonparty who has in fact enjoyed a full and fair litigation has no more claim than a party to enjoy a second chance." (footnote omitted)).[6]

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[6] Indeed, merely receiving notice of ongoing class litigation can prevent those not before the court from mounting a collateral attack under *Hansberry* based on inadequate representation. *See, e.g., Shore v. Parklane Hosiery Co., Inc.*, 606 F.2d 354, 357 (2d Cir.1979) ("[A]ppellants' right to opt-out of the proposed settlement protected their interests from the allegedly inadequate representation."). *See also Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 812, 105 S. Ct. 2965, 2974 (1985) (stating that due process has been

In this case, Tal actually participated in the trial. The relevant ruling before the Oklahoma Supreme Court in both *Tal I* and *Tal III* was the trial court's decision in *Tal I* not to permit Tal to intervene. Tal appeared at the *Tal I* trial through counsel to argue in favor of intervention, and the trial court entertained argument and was willing to receive evidence in support of the intervention motion. Tal even took the opportunity to appeal the trial court's ruling. Thus, precluding further litigation would not violate the Due Process Clause. Even if in theory *Hansberry* could authorize a collateral attack on a denial of intervention in a *qui tam* action, Tal has no right to bring such an attack here. He had his day in court.

C. Because an Oklahoma *Qui Tam* Action Is Not a "Representative Action" Within the Meaning of *Hansberry*, Denial of Intervention Could Not Have Violated Due Process.

The Oklahoma *qui tam* statute does not authorize a "representative action" within the meaning of *Hansberry*. It allows citizens to sue on behalf of public entities, but it does not give citizens any personal rights other than the right to collect a bounty if the conditions set out in the statute come to pass. Far from making public bodies and their attorneys the legal representatives of citizens, *qui tam* statutes set out conditions in which the representation relationship runs in the opposite direction: citizens become the legal representatives of public bodies. In Oklahoma, these conditions are met only when the public body acts in bad faith. In any event – in sharp contrast to absent parties in class actions, who have a personal stake in the outcome and thus rely on adequate representation on the part of named class plaintiffs – citizens permitted to prosecute *qui tam* actions do so on behalf of the state and

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satisfied if an absent plaintiff in a class action "receive[s] notice plus an opportunity to be heard and participate in the litigation, whether in person or through counsel"); *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 313, 70 S. Ct. 652, 656-57 (1950) (stating that due-process violations involve a lack of "notice and opportunity for hearing appropriate to the nature of the case" when "life, liberty or property" is at stake).

thus have no procedural rights other than those that the state affords them in its *qui tam* legislation.[7]

Contrary to Tal's assertions, *see* Petition at 14-15, this Court has already answered the question of whether states violate the Due Process Clause when they limit the standing of taxpayers who base their claims on the public interest and not on personal rights. In *Richards v. Jefferson County*, 517 U.S. 793, 116 S. Ct. 1761 (1996), two individuals employed in Jefferson County, Alabama, brought a class action seeking to declare a county occupancy tax unconstitutional. The class members were all subject to the allegedly unconstitutional tax; the suit was not a *qui tam* action. Based on the particular factual situation, including lack of notice and the fact that prior proceedings were not even prosecuted as a class action, this Court concluded that an earlier suit involving the occupancy tax did not preclude the class action.

At the same time, however, the Court made it clear in *Richards* that a taxpayer cannot use *Hansberry* to assert a due-process violation in cases "in which the taxpayer is using that status to entitle him to complain about an alleged misuse of public funds or about other public action that has only an indirect impact on his interests." *Id.* at 803, 116 S. Ct. at 1768. "As to this category of cases, we may assume that the States have wide latitude to establish procedures not only to limit the number of judicial proceedings that may be entertained but also to determine whether to accord a taxpayer any standing at all." *Id.* Due process comes into play only when a taxpayer challenges the preclusive effect of a prior judgment and also "present[s] a federal constitutional challenge to a State's attempt to levy personal funds." *Id.* Any other rule would conflict with this Court's recognition that "governmental and private entities have substantial interests in the

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[7] Because citizens who wish to assert a *qui tam* action have no personal right to recovery other than the right to a bounty if the statutory conditions are satisfied, Tal's effort to distinguish between the standard for adequacy of representation in Rules 23 and 24 is of no consequence. *See* Petition at 18-21. Regardless of the standard, he was not entitled to have the city act as his legal representative.

prompt and determinative resolution of challenges to important legislation." *Id.* at 804-05, 116 S. Ct. at 1768.

Richards anticipated cases such as this one.[8] It recognized that taxpayers without any personal stake in a governmental decision might attempt to use the notion of adequacy of representation to bring into the courts what should be a purely political process. If citizens as such could use mechanisms like *qui tam* statutes to achieve through litigation what they fail to achieve through the democratic process, then no public body could make a controversial policy decision without subjecting itself to paralyzing litigation in which those who disagree with the policy decision are entitled to argue that the body failed to represent its constituents adequately. As the delays that Tal has inflicted on the Bricktown projects involved in this litigation attest, no government can function with such constraints.

CONCLUSION

Tal's Petition should be denied.

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[8] Tal seems to admit that the Court's analysis in *Richards* undermines his due-process theory. *See* Petition at 13 n.5 ("However, without this Court's further elucidation on the parameters of [its] statement [in *Richards*], the Taxpayers believe that the unconstitutional limits imposed in this case are not within the scope of the rule or preclusion enunciated in *Richards*.").

Respectfully submitted,

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IN THE

Supreme Court of the United States

THE STATE OF OKLAHOMA, ex rel., Moshe Tal, and Taxpayers Against Ripoffs ("T.A.R."), an association of more than ten resident taxpayers of the City of Oklahoma City, Oklahoma,

Petitioners,

v.

THE CITY OF OKLAHOMA CITY, OKLAHOMA, et al.,

Respondents.

On Petition For A Writ Of Certiorari To The Supreme Court of Oklahoma

PETITIONERS' CONSOLIDATED REPLY TO RESPONDENTS' BRIEFS IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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June 14, 2001

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INTRODUCTION

Petitioners, Moshe Tal, and Taxpayers Against Ripoffs, a group of ten or more taxpayers in Oklahoma City, Oklahoma, ("Taxpayers" "Petitioners") submit this Reply Brief to respond to certain authorities and arguments presented in the Respondents', The City of Oklahoma City and Related Parties, Torchmark Corporation, the Hogan Respondents, OCURA, Oklahoma Gas and Electric Company, and The Benham Group (collectively "Respondents"), Briefs in Opposition to the Petition for Writ of Certiorari ("Briefs in Opposition" "Respondents' Briefs"). This Reply only addresses the issues raised in the Respondents' Briefs which the Petitioners believe are important to this Court's decision to grant certiorari.

Petitioners would ask the Court to note that Petitioners believe that each of the Respondents' Briefs in Opposition contain inaccurate and incorrect statements of law and fact. Most of these misstatements are not critical to this Court's decision to grant certiorari and, without waiving any right to address these misstatements in the future, the Petitioners will not respond to these misstatements at the present time. However, the correct statements of fact and law are contained in the Record below, and, if this Court deems it prudent or necessary, the Petitioners will be happy to file a separate brief and appendix pointing out and correcting the Respondents' misstatements.

I.

THE ISSUE OF DUE PROCESS WAS PROPERLY PRESERVED FOR REVIEW BY THIS COURT ON A WRIT OF CERTIORARI

When a state's highest court has failed to expressly pass upon a federal question, it is assumed that the omission was due to a failure to properly present the federal question in the state courts, unless the petitioner in the United States Supreme Court can affirmatively show to the contrary. *Exxon Corp. v.*

Eagerton, 462 U.S. 176, 181 (1983)(*citations omitted)*. However, if it is clear from the record that the federal issue was raised before the trial court by appropriate motions and arguments, and was argued in briefs before the state's intermediate and highest appellate courts, the federal question can then be considered by the Supreme Court, despite the lack of a definitive ruling on the issue by the state's highest court. *Chambers v. Mississippi,* 410 U.S. 284, 289-90 (1973).

It has long been the rule that this Court has the "jurisdiction to consider all of the substantial federal questions determined in the earlier stages of [state proceedings], . . .and our right to re-examine such questions is not affected by a ruling that the first decision of the state court became the law of the case. . . ." *Hathorn v. Lovorn*, 457 U.S. 255, 261 (1982)(*citing Reece v. Georgia*, 350 U.S. 85, 87, 76 S.Ct. 167, 169, 100 L.Ed. 77 (1955); *See also Davis v. O'Hara*, 266 U.S. 314, 321, 45 S.Ct. 104, 107, 69 L.Ed. 303 (1924); *United States v. Denver & Rio Grande R. Co.*, 191 U.S. 84, 93, 24 S.Ct. 33, 86, 48 L.Ed. 106 (1903). "Because we cannot review a state court judgment until it is final, a contrary rule would insulate interlocutory state court rulings on important federal questions from our consideration. *Hathorn v. Lovorn*, 457 U.S. at 261.

Where the failure to address a federal issue in a decision arises out of a desire to create the appearance of independent and adequate state grounds for the decision and avoid the federal matters, this Court will look beyond the stated reasons for the decision and address the federal issues.

> We are aware that a right or immunity set up or claimed under the constitution or laws of the United States may be denied as well by evading a direct decision thereon as by positive action. If a federal question is fairly presented by the record, and its decision is actually necessary to the determination of the case, a judgment which rejects a claim, but avoids all reference to it, is as much against the right * * * as if it had

> been specifically referred to and the right directly refused."

Chapman v. Goodnow's Admr., 123 U.S. 540, 548 (1887); *see also, Ward v. Board of County Commissioners of Love County Oklahoma*, 253 U.S. 17, 22-23 (1920)(discussing the power of this Court to reject state grounds that lack fair or substantial support, for without that power this Court's power to review might be easily avoided).

A. <u>The Issue of Due Process Has Been Adequately Preserved for Review</u>.

The Oklahoma Supreme Court failed to expressly pass on the issue of due process in its Opinion in *Tal III*. However, the Petitioners have affirmatively shown that the omission was not due to a failure to properly present the federal question in the state courts. The Record shows that the issue of due process was appropriately raised, briefed and argued in the district court and in the appellate court. See *Plaintiffs' Brief in Opposition To Defendants' Motions To Dismiss*, Proposition II and III, Appendix to Reply (filed herewith) pp. 34-41 (*Tal III*, Appeal Record Document 9). Similarly, in *Tal I* the Oklahoma Supreme Court fails to make clear that the basis for its decision arises out of a finding of adequate representation for purposes of intervention of right. As in *Tal III*, the record in *Tal I* shows the premises upon which the Taxpayers were denied intervention.

In each of the Respondents' Briefs in Opposition to the Petition for Certiorari the Respondents claim that the basis for the decision in *Tal I* and *Tal III* was standing and not, respectively, adequacy of representation for purposes of intervention of right and res judicata on that issue. With these arguments the Respondents are attempting to bootstrap the adequate representation requirement for intervention of right to the requirements under the Oklahoma qui tam statute. Nothing in the Oklahoma qui tam statute addresses adequate representation. See Oklahoma Qui Tam Statutes, Appendix to Petition For Writ of Certiorari, pp. 44-45. By superimposing the

adequate representation requirement to the qui tam statute, the Respondents hope to create the appearance that the decision in *Tal III* is based on state law and is not reviewable by this Court.[1]

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[1] In Proposition 5 of its Response, the City contends that the other issues raised in their Motion to Dismiss, provide independent state grounds for the dismissal of the Taxpayers' action. There is nothing in the record to support that contention. The district court order does not specify the grounds for dismissing the action. However, the Respondents' all moved to dismiss the qui tam on the grounds of res judicata. See Hogan Respondents' Consolidated Reply to Plaintiffs' Brief in Opposition to Motion To Dismiss - Appendix to Reply, pp. 2,-4, 7-13. Also See, *Tal III* Appeal Record Document 2: Oklahoma City Urban Renewal's Motion to Dismiss, pp. 18-23; *Tal III* Appeal Record Document 3: City of Oklahoma City's Motion to Dismiss, pp. 12-14; *Tal III* Appeal Record Document 4: Motion to Dismiss of Defendants' TMK/Hogan, Hogan Property Management, L.L.C., and Dan Randolph Hogan, pp. 3- 4, and 9-10; *Tal III* Appeal Record Document 5: Motion To Dismiss of Defendant Bricktown-TMK/Hogan Parking, L.L.C., pp. 3-4, and 8-9; *Tal III* Appeal Record 6: Motion to Dismiss of Defendant BAP-Bricktown, L.L.C., pp. 1, 3-4, and 8-9; *Tal III* Appeal Record 7: Motion to Dismiss of Defendant OKC Athletic Club L.P., pp. 1, 3-4, and 8-9 (Note: The contents of Appeal Record Documents 4-7 [Motions to Dismiss of various different parties] are almost identical and were written by the one law firm representing these various defendants); and *Tal III* Appeal Record Document 8: Motion to Dismiss of Defendants Bricktown Parking Investors, L.L.C. and Bricktown TMK/Hogan Entertainment, L.L.C., pp. 5-6,9, and 11-14. Also See *Tal III* Appeal Record Document 10: OCURA's Reply Brief to Plaintiffs' Opposition to Defendants' Motion to Dismiss, pp. 2-3. The Petitioners' responded to the claim of res judicata and claimed that such a bar would violate their right to due process. See Plaintiffs' Brief In Opposition to Defendants' Motion To Dismiss - Appendix, pp. 34-35, 37,41 and 43. After the court dismissed the qui tam, all of the post-dismissal hearings and pleadings, including the motions for sanctions and answers, motions for attorney's fees and answers, appellate briefs relating to sanctions and attorney's fees on appeal, appellate briefs on the appeal of the denial of sanctions, as well as

The Oklahoma qui tam statutes do not provide that Taxpayers do not have standing to bring a qui tam action so long as they are adequately represented. Petitioners' Appendix to Petition For Writ of Certiorari, pp. 44-45. The reference to adequate representation in *Tal I* and *Tal III* arises out of the rule that a party may not intervene in an action as a matter of right so long as that party's interests are being adequately represented. Thus, the holding in *Tal I* that the Taxpayers did not have "standing to intervene" because they were being "adequately represented." *Tal I* Opinion, Petitioners' Appendix to Petition For Writ of Certiorari pp. 17-31(Conclusion, p. 31). Similarly, the decision in *Tal III*, found that the ruling on adequate representation in *Tal I* barred the Taxpayers from obtaining standing to bring a qui tam after the City had ostensibly brought an action on the Taxpayers' behalf. *Tal III* Opinion, Petitioners' Appendix to Petition For Writ of Certiorari, p. 8.

Moreover the failure of the Oklahoma Supreme Court to expressly reference intervention of right in the decision in *Tal I* and res judicata on the issue of adequacy of representation as the basis for the decision in *Tal III* does not preclude this Court from granting certiorari.

In both *Tal I* and *Tal III*, the federal issues and the state law issues giving rise to the federal issues that are now presented to this Court, were adequately preserved so that this Court may review the decision in *Tal III*.[2]

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the parties and the district court have addressed and proceeded on the premise that the Taxpayers' qui tam was dismissed because it was barred by res judicata and not any of the other grounds raised in the City's or other defendants' motions to dismiss.

[2] The Hogan Respondents claim that the Taxpayers are out of time to appeal *Tal I*. The time to appeal is not relevant as Taxpayers are not seeking certiorari to review that decision, they are seeking a grant of certiorari to review the opinion in *Tal III* and that Petition for Certiorari was timely filed on May 7, 2001.

A reading of *Tal I* and a review of the underlying record shows that the district court denied Taxpayers' motion to intervene as a matter of right on the grounds that the Taxpayers' rights were being adequately represented. In the District Court the Taxpayers moved for intervention of right and permissive intervention. Petitioners' Appendix to Petition For Writ of Certiorari pp. 49-53. Taxpayers raised denial of intervention of right in their petition in error and throughly briefed that issue in their Petition for Rehearing. *Tal I* Appeal Record - Appellants' Petition for Rehearing, pp. 6-14. The Oklahoma Supreme Court affirmed the district court's dismissal on the grounds that the Taxpayers lacked standing to intervene because their rights were adequately represented.

In *Tal III*, the court held that the decision in *Tal I*, deciding that the Taxpayers were adequately represented and did not have standing to intervene in the City's Declaratory Judgment Action, barred the Taxpayers from challenging the adequacy of representation and the binding effect of the judgment under *Hansberry v. Lee*, 311 U.S. 31 (1940). The res judicata and due process issues giving rise to the federal issues asserted on certiorari were all properly raised, briefed and argued in both the district and appellate court.

The City, Urban Renewal and the Hogan Respondents all moved to dismiss the action on the grounds that *Tal I* was res judicata and barred the Taxpayers bringing the qui tam in *Tal III*. *Tal III* Appeal Record Documents 2-8, and 10-12.

In the Taxpayers brief in opposition to the motion to dismiss, the primary focus was that it was a violation of due process under the Fourteenth Amendment to hold that their claim was barred by res judicata. The Taxpayers also asserted that the denial of intervention was not res judicata and did not bar the Taxpayers bringing the qui tam

The Taxpayers claimed that they had a constitutional right under *Hansberry v. Lee* and progeny to challenge the binding effect of the judgment in the City's Declaratory Judgment Action. The Taxpayers also asserted that under *Hansberry v.*

Lee, 311 U.S. 31 the decision in *Tal I* was not binding upon them and did not prevent their bring the qui tam.

In their Reply Briefs, the City and the Hogan Defendants devoted significant portions of their briefs to arguing the different reasons why the Taxpayers did not have a right to due process or that their right to due process would not be violated by holding that the qui tam was barred by *Tal I*. Taxpayers' Brief in Opposition to Motion To Dismiss, Appendix, pp. 17-50.

The violation of Taxpayers' due process rights by the application of res judicata was expressly raised, briefed and necessarily considered by the court, in both the district court and the Oklahoma Supreme Court. The mere fact that the Oklahoma Supreme Court did not mention the due process issue in its opinion does not insulate that issue from appeal to this Court.

II.

IT IS NOT NECESSARY TO RAISE AN ISSUE IN A PETITION FOR REHEARING IN THE STATE COURT IN ORDER TO PRESERVE THAT ISSUE FOR PURPOSES OF CERTIORARI IN THE UNITED STATES SUPREME COURT.

There is nothing in this Court's Rules, the Federal Rules or in State Rules that restricts the issues raised in a petition for certiorari to those issues raised in a petition for rehearing in the state appellate court. To the contrary, in Oklahoma it is held that where an issue was raised in the petition in error and was briefed by the appellant, the issue is properly asserted on certiorari even though the issue was not raised in the petitioner's motion for rehearing. *Torres v. Kansas City Fire and Marine Insurance Company*, 849 P.2d 407, 413 fn. 7 (Okla. 1993). Moreover, the authority cited in Section I, *supra*, makes it clear that this Court can consider federal issues raised at anytime during the state court proceedings. Nothing in those cases indicates that the issues raised in a petition for certiorari

are limited to the issues raised in a petition for rehearing before the state appellate court.

The City has afforded no authority to the contrary. The City cites *Bankers Life and Casualty Company v. Crenshaw*, 486 U.S. 71 (1988) to support its claim that the Taxpayers have waived their right to appeal the issue of due process by not raising it in their motion for rehearing filed in the Oklahoma Supreme Court. The City contends that *Bankers Life* holds that this Court will not consider an issue on certiorari where that issue was not clearly raised in a petition for rehearing. This was not the holding, nor can such a conclusion be extrapolated from the decision in *Bankers*.

In *Bankers*, this Court refused to consider the issue because the issue was raised for the *first* time in a motion for rehearing and, even then, the issue was not clearly raised. *Bankers Life and Casualty Company v. Crenshaw*, 486 U.S. at 79 (*emphasis added*). It was not, as claimed by the City, because the issue was not adequately raised in the petition for rehearing that this Court rejected its assertion on certiorari. Thus, nothing in *Bankers* supports the City's claim of waiver.

The City's contention that the Taxpayers' failure to raise due process in the petition for rehearing waives the issue for review in this Court is without support in fact or law.

III.

PETITIONERS' HAVE AN INTEREST IN THE SUBJECT MATTER OF THE QUI TAM THAT IS PROTECTED BY THEIR CONSTITUTIONAL RIGHT TO DUE PROCESS.[3]

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[3] The Respondents all argue that the Taxpayers were afforded the right to be heard and participated in the City's Declaratory Judgment Action through their motion to intervene, their depositions and their written demand. According to the Respondents, the Taxpayers' opportunity to be heard satisfied the

The City, the Hogan Respondents and Torchmark argue that the Taxpayers have no right or interest in the subject of the qui tam litigation that would afford them the right to due process. They claim that the right to bring a qui tam is purely a creature of statute and there are no taxpayer interests underlying the right to bring a qui tam to enjoin the improper expenditure of taxpayers funds. This contention is without merit.

Taxpayers have a direct interest in the proper use and allocation of tax receipts by government officials. Taxpayers have a personal stake in the subject matter of a lawsuit to recover for the unlawful expenditure of tax receipts. *Sloan v. School District of Greenville County*, 537 S.E.2d 299, 301 (S.C. App. 2000). "[M]unicipal taxpayer standing has ancient roots in our jurisprudence." *Sloan v. School District of Greenville County*, 537 S.E.2d at 302 fn3 (*quoting United States v. City of New York*, 972 F.2d 464, 470). "The right of resident taxpayers to invoke the interposition of a court of equity to prevent an illegal disposition of the moneys of the county. . . there is at this day no serious question." *Sloan* at 301 (*citing Crampton v. Zabrinskie*, 100 U.S. 601, 609 (1879).

"The primary basis for taxpayer suits arises from the

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tenets of due process. This argument is disingenuous at best. However, whether the Taxpayers had a meaningful opportunity to be heard is a collateral issue and is not involved in deciding whether to grant certiorari. Whether Taxpayers had an opportunity to be heard only comes into consideration after the Taxpayers are allowed to challenge the binding effect of the judgment under *Hansberry v. Lee*. Thus, Taxpayers will not burden this Courts' resources with a presentation of authority and argument regarding what process was due the Taxpayers i..e. opportunity to confront and cross examine witnesses, to present their testimony and case orally rather than through writings, and the propriety of using the Taxpayers' depositions, without a showing that the deponents were unavailable for trial, in order to satisfy the requirement that they have a meaningful opportunity to be heard.

need to ensure that governmental officials conform to the law. It rests upon the indispensable need to keep public corporations, their officers, agents and servants strictly within the limits of their obligations and faithful to the service of the citizens and taxpayers." *Eastern Missouri Laborers Dist. Council v. St. Louis County*, 781 S.W.2d 43, 46 (Mo.1989)(citation omitted)); *see also National Waste Recyc., Inc. v. Middlesex County Improv. Auth.*, 150 N.J. 209, 695 A.2d 1381, 1387 (1997)

The Taxpayers' interest and right to sue to restrain the misuse of taxpayer monies is "rooted in the ancient jurisprudence" of this country. It is not a mere creature of statute as claimed by the Respondents. Because the Taxpayers' have a protected property interest in the taxpayer funds used by the City, the Taxpayers have a right to sue to enjoin the misuse of taxpayer monies and that right is protected by the requirements of due process.

CONCLUSION

For the reasons expressed in the Taxpayers' Petition for a Writ of Certiorari and in this Reply Brief, Taxpayers believe that this Court may properly grant Certiorari to hear the appeal on the denial of Taxpayers' right to due process.

Respectfully submitted,

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Supreme Court, U.S.
FILED
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No. 00-1685

IN THE

Supreme Court of the United States

THE STATE OF OKLAHOMA, ex rel., Moshe Tal, and Taxpayers Against Ripoffs ("T.A.R."), an association of more than ten resident taxpayers of the City of Oklahoma City, Oklahoma,

Petitioners,

v.

THE CITY OF OKLAHOMA CITY, OKLAHOMA, et al.,

Respondents.

On Petition For Writ Of Certiorari To The Supreme Court of Oklahoma

APPENDIX TO PETITIONERS' CONSOLIDATED REPLY TO RESPONDENTS' BRIEFS IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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June 14, 2001

51 pp

IN THE DISTRICT COURT OF OKLAHOMA COUNTY
STATE OF OKLAHOMA

Case No. CJ-2000-2052

THE STATE OF OKLAHOMA, ex rel, Moshe Tal, a resident taxpayer of The City of Oklahoma City, Oklahoma & Taxpayers Against Ripoffs ("T.A.R."), an association of more than ten resident taxpayers of the City of Oklahoma City, Oklahoma,

Plaintiffs,

vs.

The City of Oklahoma City ("City"), Oklahoma, a municipal corporation; et al.,

Defendants.

CONSOLIDATED REPLY OF DEFENDANTS BRICKTOWN TMK/HOGAN ENTERTAINMENT, L.L.C., BRICKTOWN PARKING INVESTORS, L.L.C., BRICKTOWN TMK/HOGAN PARKING L.L.C., OKC ATHLETIC CLUB LIMITED PARTNERSHIP, BAP-BRICKTOWN L.L.C., TMK/HOGAN, HOGAN PROPERTIES, AND DAN RANDOLPH HOGAN, TO PLAINTIFFS' BRIEF IN OPPOSITION TO DEFENDANTS' MOTION TO DISMISS

Defendants, Bricktown TMK/Hogan Entertainment, L.L.C., Bricktown Parking Investors, L.L.C., Bricktown TMK/Hogan Parking L.L.C., OKC Athletic Club Limited Partnership, BAP Bricktown L.L.C., TMK/Hogan, Hogan Properties, and Dan

Randolph Hogan, ("Defendants")[1], submit this Consolidated Reply to Plaintiffs' Brief in Opposition to Defendants' Motions to Dismiss and in support thereof would show the Court:

I. PLAINTIFFS CANNOT CONVERT DEFENDANTS' PROPER MOTIONS TO DISMISS INTO MOTIONS FOR SUMMARY JUDGMENT.

A. Attaching the Written Demand and Published Opinions Does Not Require That Defendants' Motions to Dismiss be Treated as Motions for Summary Judgment.

Defendants have properly filed motions to dismiss Taxpayers' Petition based on *res judicata* grounds. *Res Judicata* based on a prior adjudication is proper grounds for a motion to dismiss filed under 12 O.S. § 2012. *Marshall v. Ford Motor Co.,* 1973 OK 17, ¶14, 507 P.2d 912, 914; *Pruitt v. Hammers,* 1955 OK 348, ¶11,292 P.2d 157, *158-59; Adams v. City of McAlester, 1955* **OK** 216, ¶ ¶1, *5,* 286 P.2d 726-27; *Cain by and through Pierce v. Meredith,* 1994 OK CIV APP 116, ¶5, 884 P.2d 860, 861. Although Section 2012(B) requires that a motion to dismiss be treated as a motion for summary judgment where matters outside the pleadings are presented for consideration, materials evidencing the decision in a prior action involving the same parties and facts do not constitute matters outside the pleadings requiring such treatment. 12 O.S. § 20 12(B); *Marshall v. Ford Motor Co.,* 1973 OK at ¶1, 507 P.2d at 914.

In *Marshall v. Ford Motor Co.,* the Supreme Court reversed the trial court's denial of the defendant's motion to dismiss

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[1] Each Defendant continues to maintain its separate and distinct grounds for dismissal; nevertheless, for the convenience of the Court, Defendants submit this consolidated reply.

where the defendant had attached to its motion to dismiss[2] the amended complaint and amended answer, judgment on the verdict and opinion on appeal from the federal court action. *Id* at 914. The Court found, after considering the materials presented by defendants including the prior judgment, that the plaintiff was "barred by the judgment in the prior federal action against the same defendant for the same damages" and dismissed the action. *Id* at 914. (See also, where although the Court did not find the plaintiffs claims were barred by *res judicata,* the Court reviewed the attached documents evidencing the decision in the prior, related case and treated the matter as a motion to dismiss, not a motion for summary judgment. *Runyan v. City of Henryetta,* 1958 OK 3, ¶4, 321 P.2d 689. 692.)

In this case, Defendants have supplied the Court with a published opinion, *City of Oklahoma City v Oklahoma City Urban Renewal Authority et al.,1999* OK 71, 988 P.2d 901 ("Tal I")[3], affirming the denial of Plaintiffs' Motion to Intervene in the Declaratory Judgment Action (the "Declaratory Judgment Action") filed by the City of Oklahoma City (the "City") on January 26, 1999. The Declaratory Judgment Action was a prior action based on the same claims against the same

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[2] The dispositive motion was explicitly captioned by the defendant as a Motion to Dismiss Plaintiffs Cause by Reason of Res Judicata and Estoppel by Judgment.

[3] The Defendants also attached the published opinion *of State of Oklahoma ex rel., Tal v. Norick et al.,* 1999 OK *85,* 991 P.2d 999, as a legal precedent for the convenience of the Court, and the Plaintiffs' Written Demand which was incorporated by reference in the Petition and which serves as the statutory prerequisite to an alleged qui *tam* action.

[4] The addition of the Hogan Defendants and various City and Authority officials and counsel to Plaintiffs' Petition does not change the basic nature of the claims raised in the Written Demand.

defendants for the same damages.[4] Plaintiffs acknowledge in their Petition that their *qui tam* action in the case at bar is based upon the Written Demand filed January 12, 1999, the *same* Written Demand that initiated the Declaratory Judgment Action and which Plaintiffs alleged gave rise to their right to intervene. Petition, ¶ 1. This Court, reviewing only the Petition and the published opinion, can determine that Plaintiffs' claims against the Defendants are precluded. The law in Oklahoma is well settled that attaching these materials does not require that the motions to dismiss be treated as motions for summary judgment.

B. Plaintiffs' Petition on Its Face Discloses the Adverse Outcome of the Prior Adjudication.

Plaintiffs' Petition also clearly identifies on its face that a prior action was adjudicated. The Petition refers in numerous allegations to the inadequacies of the Declaratory Judgment Action filed by the City. Petition, ¶¶ 2-9. The Petition also acknowledges Plaintiffs' unsuccessful motion to intervene. Petition, ¶ 8. Finally, the Petition alleges specific wrongdoing by the counsel and witnesses participating in the Declaratory Judgment Action. Petition, ¶¶ 87(c), 88(g), 89(h), 90(e), 101(u), 101(v), and 101(w). Each of these allegations in the Petition provides evidence on the face of the pleadings of a prior adjudication and of an adverse decision. Plaintiffs should not be allowed to avoid dismissal of this Petition on grounds of *res judicata* merely by concealing from the Court the finality of the adverse outcome of this prior adjudication.

C. All Extraneous Evidence and Materials in Plaintiffs' Brief Should Be Disregarded by the Court in Deciding the Motions to Dismiss.

Plaintiffs in their Brief in Opposition to Defendants' Motions

to Dismiss (the "Opposition Brief") cite and attach various materials outside the pleadings in support of their arguments, including, without limitation, an Affidavit from lead Plaintiff, Moshe Tal. The facts derived from these outside materials should not be considered by the Court because it is not appropriate to treat Defendants' Motions to Dismiss as motions for summary judgment.

As discussed in detail above, the exhibits attached to Defendants' Motions to Dismiss do not act to convert the motions to dismiss to motions for summary judgment. Furthermore, Plaintiffs cannot, by attaching extraneous material in support of their Opposition Brief, cause summary judgment analysis to be required. Only the materials attached to the Motions to Dismiss are relevant in determining whether summary procedure is appropriate. "If a dismissal motion tenders for consideration materials dehors the pleadings in the case at bar, summary judgment procedure must be utilized." *Oulette v. State Farm Mut. Auto Ins. Co.,* 19940K 79, ¶ 6.n.10, 918 P.2d 1363, 1370, n. 10 (emphasis added, emphasis omitted). Plaintiffs cannot *unilaterally* convert the Defendants' Motions to Dismiss to motions for summary judgment. If this were permitted, plaintiffs would routinely attempt to distract the Court from the deficiencies of their petitions with potential factual disputes introduced in attached materials.

II. PLAINTIFFS' PETITION MUST BE DISMISSED BECAUSE PLAINTIFFS' DUE PROCESS ARGUMENT IS A SHAM.

A. Plaintiffs are in Privity with the City Under Oklahoma's *Qui Tam* Statutes and Have No Independent Cause of Action.

Plaintiffs' due process arguments have no merit. Plaintiffs are bound by the judgment rendered in the City's Declaratory Judgment Action because the City adjudicated any possible claim that the Plaintiffs may have been statutorily entitled to bring as *qui tam* plaintiffs. Plaintiffs' Petition based on a *qui*

tam action does not implicate the due process concerns, about the preclusive effect of a judgment to which they were not a party , that are applicable to a representative or derivative action. Plaintiffs base their qui *tam* action solely on the statutory authority of 12 O.S. §§ 372 *et seq.*. Plaintiffs have not been denied their "full and fair hearing" on the issues raised in the Written Demand because they were never entitled to a hearing in the first place.

Plaintiffs have had their day in court. By statute, there is an identity of interest between Plaintiffs and the City. A *qui tam* plaintiff has no interest divisible from the municipality whose claim it espouses; in fact, a signatory to a *qui tam* demand has no standing at all if the municipality responds in good faith to a proper demand. *Braly v. Ford,* 1941 OK--, 116 P. 2d 988. Here, it was finally determined by the Court that Plaintiffs have no independent standing.

Plaintiffs have no independent cause of action; they would have had standing to bring the City's claim under § 373 *only* had the City failed to act. Under Oklahoma's *qui tam* statutes, a taxpayer may not bring a suit in his own name to recover property for the benefit of a municipality. A taxpayer must bring the claim *in the name of the state,* and may do so *only* after the municipality has failed to respond to a written demand. 62 O.S. §§ 372-373; *Vaughn v. Latta,* 1934 OK - -, 33 P. 2d 795, 796. If the municipality responds to the written demand, the taxpayers have no independent cause of action, because any claim they might be permitted to raise if the municipality failed to respond is identical to the claim of the municipality. *Id.*

Plaintiffs here are in privity with the City because their claims arise solely from the Written Demand. Petition, ¶ 1. By serving the Written Demand, Plaintiffs invoked by their own election the *qui tam* statutory process. Pursuant to that process, *qui tam* plaintiffs only have a claim upon the failure of the City to act. When the City filed the Declaratory Judgment Action, any potential claim the Plaintiffs may have wanted to institute

based on the Written Demand was extinguished. By statute, once the Declaratory Judgment Action was filed, the City was the only party entitled to pursue those claims, on behalf of itself, the Plaintiffs and all taxpayers. As the Supreme Court said,

> When Oklahoma City filed its declaratory judgment action, it placed in issue T.A.R.'s contentions for resolution by an unbiased court. T.A.R. was entitled to no more.

Tal I, 1999 OK 71,¶28, 988 P.2d 901, 907.

B. Plaintiffs Admitted that the City Adequately Represented Their Interests When They Sought Permissive Intervention Rather Than Intervention as a Matter of Right.

It is critical, too, to bear in mind that Plaintiffs' motion to intervene in the Declaratory Judgment Action was based on the *permissive* intervention statute found at 12 O.S. § 2024.B.2. Plaintiffs did not seek to intervene as a matter of right. See *Tal I*, 1999 OK 71, ¶ 15. This failure is Plaintiffs' *concession* that the City was adequately representing all taxpayers in the Declaratory Judgment Action. Had the City's conduct in the Declaratory Judgment Action been truly "antagonistic" to the interests of the taxpayers, as they now claim, they would have sought to intervene as a matter of right under 12 0.S. § 2024.A. By seeking non-mandatory intervention, Plaintiffs conceded that they were not necessary parties to the Declaratory Judgment Action. 12 0.S. § 2024. Plaintiffs have no due process claim, and their Petition must be dismissed.

C. Plaintiffs Are Precluded From Re-Litigating the Adequacy of the City's Representation To Support a Due Process Claim.

Even if Plaintiffs were not privies of the City in the Declaratory Judgment Action, they still have no due process

claim. Plaintiffs' claim of a due process violation is based on the argument that the City did not adequately represent their interests in the Declaratory Judgment Action. Plaintiffs cannot effectively make that argument because the issue of adequate representation was conclusively determined against Plaintiffs when they lost, in the trial court and on appeal, their motion to intervene. The adverse judgment denying Plaintiffs' motion to intervene precludes Plaintiffs' collateral attack on the adequacy of the City's representation in support of any claim of violation of due process.

When the trial court denied Plaintiffs' motion to intervene and the Supreme Court affirmed the denial, the issue of Plaintiffs' right to challenge the economic development agreements[5](the "Agreements") was conclusively determined. *Tal I,* 1999 OK 71, ¶ 16, 988 P.2d at 906. Plaintiffs are precluded by the principle of *res judicata* from arguing in this Petition that the City did not represent their interests and that due process protects them from the preclusive effects of the trial court's determination as to the validity of the Agreements.

Even if a due process claim based on the adequacy of the representation of the City was plausible, Plaintiffs brought, argued and appealed the motion to intervene and are most assuredly bound by the resulting judgment that the Plaintiffs had no right to intervene and that the City adequately represented their interests. *Temeron, Inc. v. Ferraro Energy Corp.,* 1993 OK CIV APP 97, ¶ 10, 861 P.2d 319, 323 (all issues raised in a petitioning intervenor's motion may be afforded full

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[5]Parking Redevelopment Agreement, dated December 19, 1997, and a Ground Lease, dated February 4, 1998, by and between the Oklahoma City Urban Renewal Authority and Bricktown Parking Investors, L.L.C. and Redevelopment Agreement, dated July 21, 1998, by and between the Authority and Bricktown TMK/Hogan Entertainment, L. L.C. (collectively, the "Agreements")

preclusive effect).

Plaintiffs moved to intervene in the trial of the Declaratory Judgment Action under the permissive intervention provisions found at 12 O.S. § 2024.B.2. The District Court, in denying Plaintiffs' Motion to Intervene, heard and considered Plaintiffs' argument and authorities, their depositions, and the allegations of Plaintiffs' Written Demand. *Tal I,* 1999 OK 71, ¶ 22, 988 P.2d at 906. The Supreme Court in affirming the denial of Plaintiffs' motion to intervene found that Plaintiffs failed to show that the City had acted in bad faith, which showing was a prerequisite to any right to intervene. *Id* at ¶ 22, 907.

The Supreme Court's conclusions in *Tal I* require but one outcome here: that Plaintiffs Petition be dismissed because its claims, based on the Written Demand, are barred by *res judicata*[6]. The Supreme Court repeatedly found that there was no fraud or bad faith by the City:

> In any event, there is nothing in the record to reflect that Oklahoma City acted in bad faith....
>
> That the disagreements among Council members were resolved in a way that Tal and the other T.A.R. members do not like does not support in any way T.A.R.'s claims that the development Agreements were either fraudulent, unlawful or otherwise inadequate....
>
> There being no showing of fraud or unlawful

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[6]In the Declaratory Judgment Action, Plaintiffs also argued that the City failed to adequately represent their interests because the City requested that the trial court review the allegations of invalidity and either validate or invalidate the economic development agreements and transfers of property. The Supreme Court in *Tal I* rejected Plaintiffs' contentions, holding that the City was not required to support the Plaintiffs' claims in its Declaratory Judgment Action. *Tal I,* 1999 0K 71, ¶ 18.

> activity here, T.A.R. lacks standing to attack the City's decisions.

Tal I, 1999 OK 71, ¶¶ 20-21, 988 P.2d at 906.

The trial court found and the Supreme Court affirmed that the City had adequately represented taxpayer interests in the Declaratory Judgment Action. "... Oklahoma City *was representing the rights of all its taxpayers* and was entitled to the presumption that it would do so in good faith. T.A.R. failed to overcome this presumption.' *Tall,* 1999 OK 71, ¶ 31, 988 P.2d at 908 (emphasis added). The ruling by the Supreme Court as to the issue of representation is *res judicata* on Plaintiffs' due process arguments here. Plaintiffs are precluded from arguing that the City did not represent their interests and without such lack of representation, Plaintiffs have no standing to bring this Petition.

Without the argument that the City failed to represent Plaintiffs' interests in the adjudication of the Declaratory Judgment Action, Plaintiffs have no grounds for disputing the preclusive effect of the trial court's determination that the Agreements are valid, lawful and constitutional in all respects. Since the City and the Plaintiffs were in privity and the adequacy of the City's representation is unassailable, the validity of the Agreements has been conclusively determined and the Petition must be dismissed.

D. Plaintiffs' Cited Authorities Are Inapposite to the Determination of the Preclusive Effect of the Judgment that the Agreements Are Lawful.

Plaintiffs' arguments and authorities in their Opposition Brief do not alter the conclusion that the Petition must be dismissed for failure to state a claim. The authorities on which Plaintiffs rely are without exception predicated upon proof of conflict of interest, bad faith or inadequate representation — all points that Plaintiffs tried and failed to establish by their motion to intervene and subsequent appeal.

Plaintiffs' cited authorities simply do not have relevance in this case. In each case upon which Plaintiffs rely, the linchpin of the decision was a finding by the court of conflict of interest, bad faith or inadequate representation, arguments which are precluded in the case at bar. The Supreme Court in affirming the denial of the motion to intervene in *Tal I* expressly rejected Plaintiffs' allegations of conflict of interest, bad faith or inadequate representation. The Supreme Court held that the Plaintiffs failed to prove any basis to support taxpayer standing. *Tal I,* 1999 OK 71, ¶ 31, 988 P.2d at 908. Plaintiffs' authorities cannot change that result.[7]

Plaintiffs' position as to *res judicata* collapses without a finding of inadequate representation, and the issue of adequate representation was decided as a matter of law in the Plaintiffs' appeal of the denial of the motion to intervene. Plaintiffs cannot escape the preclusive effect of *Tall,* which held that the City property represented *all* taxpayers including Plaintiffs, in responding to the Written Demand. The fact is that Plaintiffs failed in the Declaratory Judgment Action to demonstrate

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[7]The authorities cited by Plaintiffs are each based on the arguments precluded by the judgment in *Tall* from being raised here. See, e.g. *Hansherry v. Lee,* 311 U.S. 32 (1940) (requires inadequacy of representation and lack of identity of interest in the prior action); *Richards v. Jefferson County,* 517 U.S. 793, 802-803 (1996) (where taxpayers allege misuse of public funds, states have wide latitude to establish procedures not only to limit number of judicial proceedings that may be entertained but to determine whether to accord taxpayer any standing - a finding of adequate representation in a prior suit is a bar to taxpayer standing); *Johnson v. American Gen. Ins. Co.,* 296 F. Supp. 802 (D.C.D.C. 1969) (differing interests of shareholders allowed avoidance of prior judgment); *Consumers Union* **v.** *CPSC,* 590 F. 2d 1209, 1217 and 1222 (9th Cir. 1980), rev'd (445 U.S. 375 (1980) (unless interests diverge government may represent interest of citizens).

conflict of interest, bad faith and inadequate representation, and "[t]his ends the inquiry." *Tal l,* 1999 OK 71, ¶ 19, 988 P.2d at 906. Plaintiffs are not legally entitled to a second bite at the apple. The Petition must be dismissed with prejudice.

III. PLAINTIFFS' PETITION IS AN IMPERMISSIBLE COLLATERAL ATTACK ON THE TRIAL COURT'S FINAL JUDGMENT WHICH HELD THE AGREEMENTS NOW CHALLENGED CONSTITUTIONAL AND VALID IN ALL RESPECTS.

A. The Validity of the Agreements Has Been Conclusively Determined As To Plaintiffs.

Plaintiffs concede that under Oklahoma law any claim which was or could have been addressed in the Declaratory Judgment Action is barred from relitigation by any party or its privies. Opposition Brief at pp. 16-17, citing *Temeron, Inc. v. Ferraro Energy Corp.,* 861 P. 2d 319, 323 (Okla. App. 1993). As established in Proposition II above, Plaintiffs' *qui tam* claims herein are barred from re-litigation because Plaintiffs are in privity with the City; the very nature of a *qui tam* action makes any other conclusion impossible, and any arguments to the contrary are barred by *res judicata.*

The Court in the Declaratory Judgment Action, after a hearing on the merits, determined that the Agreements challenged in the Written Demand, and challenged again by Plaintiffs in their Petition based on the Written Demand, were lawful. *Tall,* 1999 OK 71, ¶¶ 7, 988 P. 2d at 904. As the Supreme Court acknowledged in *Tal I.*

> The case has been tried and the record developed supports the trial court's finding that the property at issue was sold at its fair market value and that the protections for the public to safeguard its interests spelled out in the agreement were adequate. This ends the inquiry and T.A.R.'s expression of a contrary

opinion in its Demand, without factual support, does not change the result.

Tal I, 19990K 71,¶ 19.

The trial court's judgment that the Agreements are valid is final and non-appealable. Plaintiffs' Petition is nothing more than an impermissible collateral attack on the final trial court judgment confirming the lawfulness of the Agreements. As a privy of the City in the Declaratory Judgment Action, Plaintiffs are precluded from collaterally attacking the validity of the Agreements because such validity was conclusively determined when the trial court's finding of lawfulness was final. Plaintiffs' Petition is based solely on Plaintiffs' claims in the Written Demand that the Agreements are illegal. Since the legality of the Agreements is unassailable, the Petition must be dismissed as to the Defendants.

B. No Liability Can Be Established Against Any of the Defendants in the Absence of an Invalid Agreement.

The *qui tam* statutes create joint and several liability based on an unlawful public contract. 12 Okla. Stat. § 372. As the Agreements' validity is unassailable, Plaintiffs attempt to hold the Defendants[8] liable either as parties to the Agreements or for their alleged knowledge of or benefit from the Agreements is clearly barred by *res judicata.* The *sole* ground for liability

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[8]Plaintiffs make no independent allegations against defendants OKC Athletic Club Limited Partnership or BAP-Bricktown, L.L.C. and their allegations against the defendants labeled by Plaintiffs as the "Hogan Defendants" are vague and unspecific. Plaintiffs apparently assume that challenging the validity of the agreements justifies the inclusion of these various parties as defendants. As the Agreements' validity has been conclusively determined, Plaintiffs lose even that argument.

under 62 O.S. § § 372-3 73 is based upon being a party to or benefitting from an *"unlawful* or *fraudulent* contract" or *"unlawful or fraudulent* transfer of money or property." 62 O.S. § 372 (emphasis added). The Agreements and any related transfers of property have been fully and finally determined to be *completely legal* and *without fraud* under prevailing law, therefore, no cause of action based on this illegality can exist. Plaintiffs' Petition as to all of the Defendants[9] must be dismissed for failure to state a claim.

IV. PLAINTIFFS' ALLEGATIONS ARE BARRED IN TOTALITY BY THE STATUTE OF LIMITATIONS.

Even assuming Plaintiffs could somehow escape the preclusive effect of the prior litigation, their claims are barred by the six months statute of limitations found at 62 O.S. § 374. That section bars *any qui tam* action filed more than six months after the City's *"refusal, failure, or neglect...* to act upon a written demand." 62 O.S. § 374 (emphasis added)[10]. If the City failed to respond to Plaintiffs' Written Demand of January 12, 1999. this failure occurred on January 26, 1999. the date the City filed the Declaratory Judgment Action. Plaintiffs concede this fact in their Opposition Brief. Plaintiffs allege:

> The *City failed, refused and neglected to bring proper action* to recover the illegally spent Maps [sic] money and illegally transferred property. The evidence clearly shows that the City disputed the Taxpayers' claims. It brought the Declaratory Judgment [Action] solely for the purpose of avoiding the Taxpayers' claims. *Ii is*

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[9]Plaintiffs failed to even address the argument raised by defendants OKC Athletic Club Limited Partnership or BAP-Bricktown, L.L.C. that the Petition contained no allegations against them. Pursuant to Rule 4(e) of the Rules of the District Court, this argument is deemed confessed.

[10]Plaintiffs' concede that the six months limitation applies. They contest only when it was triggered.

> *obvious to the most casual observer* that the interests of the City and Taxpayers' were locked in irreconcilable conflict.

Opposition Brief, P. 24(emphasis added).

Plaintiff's themselves contend that the tiling of the Declaratory Judgment Action was itself a failure to respond to the Written Demand, a failure *"obvious* to the most casual observer.' As this "failure" occurred on January 26, 1999, Plaintiffs' suit filed March 15~ 2000, was instituted well *after* the expiration of the six months statute of limitations. Plaintiffs claims are clearly time barred.

Plaintiffs' reliance on *Taxpayers League of Wayne County v. Wightman,* 28 N.W. 2d *575* (Neb. 1947), likewise compels the conclusion that their claims are time barred. Plaintiffs cite that case for the proposition that "[w]here a City shows its *intent* to dispute or contest the allegations made in the Taxpayers' written demand, it can be *presumed* that the *City has refused* to pursue the Taxpayers demand." Opposition Brief, p.23(emphasis added).

Here Plaintiffs argue strenuously that the City's Declaratory Judgment Action was *on* its *face* an "obvious" refusal to respond to the Written Demand. That refusal occurred. if at all, on January 26, 1999, the date the Declaratory Judgment Action was filed, when Plaintiffs contend the City's manifest intent not to comply with the Written Demand compelled the presumption of failure to comply. This action, filed more than six months later, is absolutely time barred.

A penal statute such as 62 O.S. §§ 372-374 is to be strictly construed according to its terms. *State ex rel. Hettel v. Security National Bank and Trust Company in Duncan,* 1996 OK 53, 922 P.2d 600, 606, rhg. den.; *State ex rel Allen v. Board of Education of ISD No. 74,* 246 P.2d 368. 373 (Okla. 1952). The six month bar to bringing a qui *tam* suit is not severable from the balance of the statute. Plaintiffs' Petition is time barred.

WHEREFORE, premises considered, Defendants Bricktown TMK/Hogan Entertainment, L.L.C., Bricktown Parking Investors, L.L.C., Bricktown TMK/Hogan Parking L.L.C., OKC Athletic Club Limited Partnership, BAP-Bricktown L.L.C., TMK/Hogan, Hogan Properties, and Dan Randolph Hogan move that Plaintiffs' Petition be dismissed with prejudice for all of the reasons as more particularly set forth herein, and for such other and further relief as the Court deems just and equitable.

Respectfully submitted,

/S/ Melvin R. McVay, Jr.

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[Certificate of Service Omitted]

IN THE DISTRICT COURT OF OKLAHOMA COUNTY
STATE OF OKLAHOMA

Case No. CJ-2000-2052

THE STATE OF OKLAHOMA, ex rel, Moshe Tal, a resident taxpayer of The City of Oklahoma City, Oklahoma & Taxpayers Against Ripoffs ("T.A.R."), an association of more than ten resident taxpayers of the City of Ok1ahoma City, Oklahoma,

Plaintiffs,

vs.

The City of Oklahoma City ("City"), Oklahoma, a municipal corporation; et al.,

Defendants.

PLAINTIFF'S BRIEF IN OPPOSITION TO DEFENDANTS' MOTIONS TO DISMISS

Plaintiffs, Moshe Tal ("Tal") and Taxpayers Against Ripoffs ("T.A.R.") submit this brief in opposition to the Motions to Dismiss of various defendants. The Motions were filed by the *Urban Renewal Defendants* including the Oklahoma City Urban Renewal Authority and related defendants, Stanton L. Young, Fred Jones Hall, J. Larry Nichols, Warren Gardner, James R. Tolbert III, William O. ("Bill") Johnstone, Tiana P. Douglas, and Dan Batchelor; the *City Defendants* including the City of Oklahoma City and related defendants including, Kirk D. Humphreys, William O. West, Daniel Brummitt; and the *Hogan Group Defendants* including OKC Athletic Club, BAP Bricktown Parking, TMK Hogan Parking, the Hogan Group including TMK/Hogan, Hogan Property Management, L.L.C., Randy

Hogan. (Collectively "Defendants").

The Defendants all assert that the City's Declaratory Judgment Action is res judicata and, even though T.A.R. was not a party to the action, T.A.R. is precluded from bringing the present action. They additionally assert because the City brought an action in response to T.A.R.'s Written Demand, T.A.R. does not have standing to bring this Qui Tam action[1]. While Defendants' arguments are seemingly plausible, their plausibility evaporates in light of the facts that show that denial of T.A.R.'s right to bring this action is a denial of due process.

T.A.R. is entitled to a full and fair hearing on the claims asserted in its Written Demand. T.A.R. was denied this due process right when the City acted as the taxpayers' putative representative in the Declaratory Judgment action. The record shows that the City's interests in the Declaratory Judgment were antagonistic and in direct conflict with the Taxpayers' interests. This conflict of interest prohibits the judgment in the Declaratory Judgment action from being asserted as res judicata against T.A.R.

STATEMENT OF FACTS

1. On January 12, 1999, T.A.R. filed its Written Demand. - ***See Exhibit A.*** The Written Demand demanded that the City bring an action to declare various agreements between the City, Urban Renewal Authority and Third Parties, illegal and void and to recover all transfers of funds or property made pursuant to these illegal agreements.

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[1] The various Defendants also assert other grounds for dismissal that are not common to the Defendants as a group. Those Defendants are identified and their claims addressed herein.

2. T.A.R. alleged the Agreements, the Parking and Ground Lease agreements (the "Parking Agreements"), the Redevelopment Agreement and the Myriad/Arena heating & cooling plant contracts/construction (the "Power Plant" "Power Plant Agreement") were illegal and void.

3. In each claim, T.A.R. alleged the agreements/contracts were illegal and void because of conflicts of interest of City and Urban Renewal[2] officials, misconduct by City/Authority officials, staff, consultants and beneficiaries of the expenditures. It also alleged violations of the Oklahoma Constitution, violations of the MAPS Ordinance and procedures, as well as violation of City Charter and state laws. See ***Appendix I - Summary of T.A.R.'s 1/12/99 Written Demand.***

4. Three days later, on January 15, 1999, the Municipal Counselor prepared and submitted to the City Council a proposed Resolution to allow him to file the Declaratory Judgment Petition and to ask the court to . . ***judicially confirm the lawfulness and validity of such agreement. Exhibits B-1 (Memorandum) and B-2 (Resolution).***

5. A legal proceeding to ***judicially confirm the lawfulness and validity of such agreement*** was how the Municipal Counselor again explained the Resolution's purpose when he had it placed on the City Council Agenda for a vote. See ***Exhibit C - City Council Agenda (1/19/99) Proposed Resolution, Item VIII-G 1.***

6. The City Council passed the Resolution to allow Municipal Counselor to initiate the Declaratory Judgment Petition as proposed. *See* ***Exhibit D - Resolution (1/19/99)*** . However the initial proposed Resolution had been

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[2] "Authority" or "Urban Renewal" as referred to herein means the Oklahoma City Urban Renewal Authority.

amended to change the word *confirm* to *determine*. ***Exhibit E, Amendments to Resolution.***

7. On January 26, 1999, the Municipal Counselor filed the Declaratory Judgment Petition seeking the court's declaration that the agreements with the Hogan Group Defendants were legal. *See* ***Exhibit F*** (***1/26/99 Petition only - Attachments omitted***).

8. The Petition did not include or even mention in passing, any allegations or charges regarding illegal conduct by City officials, nothing about conflicts of interest, nothing about the power plant, nothing about violations of the MAPS Ordinance, nothing about violation of eminent domain laws, or any other allegations contained in T.A.R.'s Written Demand. *See* ***Appendix I - Summary of T.A.R.'s Claims***.

9. Defendant and Municipal Counselor , Dan Brummitt summarized the City's intent in bringing the Declaratory Judgment action.

   The City brought this action as a declaratory judgment, your Honor, because it was the only thing that we could do to prevent our client, the City Council members, from being subject to personal liability in a lawsuit alleging that these redevelopment agreements are unconstitutional. We took the only action that we could take by bringing this action as a declaratory judgment, we're going to put the agreements in from of the Court. Id., ***Exhibit L***, pp. 35-36

10. In the *Redevelopment Plan* (***Exhibit G***), Urban Renewal is designated as the City's agent and is authorized by the City to act on behalf of the City in undertaking and administering the Redevelopment Agreement. The Redevelopment Agreement also specifically states that the City is the beneficiary of all instruments and agreements.

    ... Redevelopment Plan will be undertaken and

administered by the Oklahoma City Urban Renewal Authority (hereinafter also called the "Authority"), ***acting on behalf of the City of Oklahoma City*** *and pursuant to its authorization to perform and fulfill the specific MAPS objectives assigned herein as well as the undertaking of other approved project activities and purposes.* (Emphasis Added).

Exhibit G - Redevelopment Plan, p. 2.

In Section IV, A, 4 of the *Redevelopment Plan*, it provides:

"***The City of Oklahoma City shall be the beneficiary to all instruments and agreements*** *incorporating land use provisions and building requirements"...* (Emphasis Added).

Exhibit G - Redevelopment Plan, pp. 5-6.

On page 6, Subsection B of the *Redevelopment Plan* it states:

In order to achieve the objectives of the Plan and in order to assist redevelopers in redeveloping property, ***the Authority acting on behalf of the City of Oklahoma City*** *will subject land to be redeveloped to specific regulations and controls at the time of land disposition.* (Emphasis Added).

Exhibit G - Redevelopment Plan, p. 6.

11. Consistent with its goal of **confirming** the validity of the agreements, the City brought the declaratory judgment action against its own agent, Urban Renewal, and the Hogan Group Defendants, the other parties to the agreements. ***Exhibit A***, pp. 6 & 12. This was not the action requested in the Written Demand. See ***Exhibit B-1***, p. 1, ***William West's 1/15/99 Memorandum*** to Mayor & Council acknowledging T.A.R.'s request ... *that the City* ***and Authority*** *and various other public officers take legal action concerning the alleged invalid agreements.*

[Emphasis added].

12. On January 27, 1999, the City's agent, Urban Renewal, filed its answer to the Declaratory Judgment Petition seeking a declaratory judgment in its favor **confirming** the validity of the Agreements with the Hogan Group Defendants. ***Exhibit H - Authority's Answer***, ¶ 3, page 2.

13. The City did not investigate the allegations in the Written Demand. The City did not perform any discovery. It did not take depositions, interview any of the members of T.A.R., submit interrogatories, or take any other steps to obtain evidence supporting or rebutting T.A.R.'s allegations.

14. Neither the City nor its attorneys even attempted to contact T.A.R. or Tal to inquire about any evidence supporting the allegations of conflict of interest, illegal expenditures of MAPS funds or the illegality of the Power Plant agreement. See ***Exhibit I- Tal's Affidavit*** , p. 1, ¶ 3.

15. On or about February 18-19, 1999, Hogan Group Defendants lawyers served subpoenas on members of T.A.R. for depositions to be taken on February 22-23, 1999.

16. T.A.R.'s leader, Moshe Tal ("Tal") informed The Hogan Group Defendants attorneys that he was leaving on a 10 day business trip to Puerto Rico on February 20, 1999 and would not be available for deposition until after March 1, 1999. At the request of The Hogan Group Defendants attorneys', Tal agreed to postpone his trip by one week. ***Exhibit I- Tal's Affidavit*** , p. 1, ¶ 5.

17. On February 22, 1999, at the beginning of Tal's deposition, all attorneys including TMK/Hogan's attorney (Mr. McVay), City's Attorney, Dan Brummitt, and Urban Renewal attorneys, Janis Powers and Dan Batchelor - all

> ... *STIPULATED AND AGREED by and among the attorneys for the respective parties hereto that* ***all objections,*** *except as to the form of the question,* ***are reserved until the time of trial, at which time they may be made with the same force and effect as if made at the time of the taking of this deposition.*** See ***Exhibit J - Tal's Deposition***, p. 4. This stipulation and agreement led Tal and T.A.R. to believe that they would be notified of the trial and would have the opportunity, mandated by due process, to submit their objections and/or rebut any issue. See ***Exhibit I - Tal's Affidavit***, p.2, ¶ 7.

18. The Hogan Group Defendants took the only depositions in the action and those were the depositions of T.A.R. members and Tal. The City's and Urban Renewal's attorneys were present at the depositions. However, the City's and Urban Renewal's attorneys did not ask any questions of T.A.R. members or Tal.

19. The only issues discussed in the depositions were only those inquired into by The Hogan Group Defendants attorneys. None of the City or Authority attorneys attempted to discover or explore what evidence Tal had to support the claims regarding conflicts of interest and other illegal dealings. TMK/Hogan's attorney, Mr. McVay, asked Tal about the conflict of interest claim.[3] He touched these issues briefly. Tal's response was to name a few officials and state that he did not want to make any more

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[3] McVay was asking the questions in a numerical order as set forth in the Written Demand. He asked about the conflict of interest claims when he reached the conflict of interest allegation in Claim I, p. 6. Shortly after the question was asked, Urban Renewal attorney Dan Batchelor asked for a recess. When McVay continued on his orderly questioning, he did not ask about the conflict of interest claims when he reach those claims in Claim II.

accusations until he obtained further evidence. However, McVay did not ask for any documentation or evidence that Tal might have to support the claims. At that point, Mr. Batchelor stood up, and T.A.R.'s attorney (Kennedy) asked if they wanted to take a break. During the recess, Tal saw McVay, Batchelor and Brummitt talking in the hallway. When the deposition continued, McVay did not return to asking anymore questions or make any further inquiries into the conflict of interest claim. Neither City attorney, Brummitt, nor the Authority's two attorneys, Batchelor and Powers, asked any questions about the conflict of interest claims. See ***Exhibit I- Tal's Affidavit***, pp. 2-3, ¶ ¶ 9-11.

20. Tal did not waive his right to read and sign his deposition. He specifically requested a copy of the transcript be sent to him so that he could read it and make corrections before he signed it. ***Exhibit J - Tal's Deposition***, p. 126. Tal did not receive a copy of the deposition, he never had an opportunity to correct and sign it.

21. None of parties advised Tal or T.A.R. that trial was scheduled for March 1, 1999. See ***Exhibit I - Tal's Affidavit***, p.3, ¶ 12 .

22. T.A.R.'s attorney discovered that the trial date was scheduled for Monday, March 1, 1999 when a Daily Oklahoman reporter called the him on Thursday evening, February 25, 1999. See ***Exhibit L - Trail Transcript*** (3/1/99), pp. 13-14.[4]

23. The Hogan Group Defendants filed its trial brief on Friday, February 26, 1999 (one business day before the scheduled trial), and Urban Renewal filed its trial brief on March 1, 1999 - the day of the trial. Trial began at 9:00 a.m.

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[4] ***Exhibit L*** contains only pages relevant to this motion. The full 200 page transcript is available upon request.

Exhibit M, District Court Docket.

24. The plaintiff, the City, the putative representative of the Taxpayers, did not file a trial brief. See ***Exhibit M - District Court Docket.***

25. Besides the original Declaratory Judgment Petition, T.A.R. was not provided with any of the pleadings filed or given any notice of the trial date. ***Exhibit I -Tal Affidavit***, p. 4, ¶ 15 .

26. The sole issue adjudicated at trial was the adequacy of the consideration given for the property transferred to the Hogan Group Defendants.

27. Despite only having one business day's notice of the trial, on the morning of trial, T.A.R.'s attorney appeared before the court to present a motion to intervene and for continuance. T.A.R.'s attorney asked for a one week continuance so that he would have time to prepare his case.

28. Attached to the motion to intervene, was a copy of the Petition T.A.R. proposed to file if it was permitted to intervene but not given a continuance. The petition was limited to the issue of adequacy of the consideration for several reasons, including:

    a. The City, Urban Renewal and TMK/Hogan had limited the litigation to the issue of adequacy of consideration.

    b. T.A.R. was taken by surprise when it discovered trial was going to be held less than five weeks after the Petition was filed and T.A.R.'s attorney was not prepared to draft a Petition on all of the claims asserted in the Written Demand.

    c. Moshe Tal was absent from the country when he and T.A.R.'s attorney discovered that the

trial was set for Monday, March 1, 1999. Tal was the sole person with the knowledge and evidence sufficient to support T.A.R.'s allegations of conflicts of interest and other wrongdoing. See, ***Exhibit I - Tal's Affidavit***, p.1, ¶ 1 and pp. 3-4, ¶ 14.

d. Tal's absence combined with the City's complete neglect of its duty to conduct discovery or otherwise investigate and collect evidence, left T.A.R.'s attorney without the evidence needed to support all of T.A.R.'s claims.

e. The extremely short notice of trial and necessity for T.A.R. to prepare a petition in one business day, left T.A.R.'s attorney without sufficient time or means to prepare a petition addressing all of the allegations raised in the Written Demand that were not raised in the Declaratory Judgment Action.

29. The trial court denied the motion to intervene pursuant to 12 O.S. § 2024. It found that T.A.R.'s interest in adjudicating the sufficiency of the consideration was adequately represented by the City. Accordingly, the court also denied the motion for continuance.

30. The City and Urban Renewal told the Court that adequacy of consideration was the only issue contained in the Written Demand. This misrepresentation of the contents of the Written Demand meant that the court only considered the City's representation on the claim of inadequate consideration when it found that the City was adequately representing the Taxpayers.

31. The City's misrepresentation of the scope of the claims in the Written Demand narrowed the scope of the court's inquiry when it considered whether the City adequately represented the Taxpayers interest in the declaratory

judgment. This narrow scope of inquiry meant that the court did not have:

a. any of the evidence showing the City or Urban Renewal officials' conflicts of interest.

b. Any evidence relating to misconduct on the part of City or Urban Renewal officials or employees.

c. It did not have a "picture" of the City's overall conduct during the litigation and was not fully aware of the procedures employed by the City to keep T.A.R. out of the suit and strictly limit the issue to adequacy of consideration while meticulously evading any of the truly controversial issues charged in the Written Demand.

32. The trial lasted half a day. The City (represented by Defendant Brummitt) called only one witness, Assistant City Manager and former MAPS Program Director Jim Thompson. The examination of Thompson was limited to questions relating to adequacy of consideration of the Parking and Redevelopment Agreements with the Hogan Group Defendants.

33. The City, the putative representative of the interests of all Taxpayers, did not cross-examine any of the witnesses called by the defendants nor did it introduce any evidence or witnesses to rebut the defendants witnesses or evidence.

34. On appeal the trial record was severely limited because the City purposely limited the issues adjudicated to adequacy of consideration and prevented T.A.R. from introducing the other issues contained in it Written Demand. Because of the the City's failure to investigate or even address the other claims in the Written Demand, along with its rush to judgment,. T.A.R., as a non-party, did not have an opportunity to introduce evidence, call

witnesses or cross examine the defendants' witnesses. Thus, the Taxpayers were prevented from presenting the evidence showing the conflicts of interest and the City's misconduct. Pursuant to Sup. Ct. Rule. 3.11, a party to an appeal may not raise issues or present materials that were not presented to the trial court and/or that are not contained in the record.

35. If the City had inquired of T.A.R. or Tal or performed a de minimis investigation it would have discovered that the following City Official has serious conflict of interests. A more detailed information is provided in ***Appendix II - List of conflict of Interest of City Officials and Supporting Evidence***. However, the following is a summary of the conflicts of interests of the following City Officials:

I. **Mayor Kirk Humphreys Conflict of Interest**: (1) Humphreys had been doing business with Randy Hogan for more than five years; (2) Humphreys still owns an interest in Bricktown properties and deceived the City and the public when he announced that he sold his interest in the Bricktown Garage; (3) In addition to his direct interest, Humphreys also has indirect interest in City/Maps public expenditures by way of his partnership with other Bricktown property owners; (4) Humphreys filed three false Financial Interest Affidavits since he took office; (5) Humphreys violated numerous laws including: Article 2, § 8 of the City Charter and other City and State laws including Title 11 O.S. § 38-118 and City Ordinance 17,585 and possibly other civil and criminal law violations.

II. **Fred Jones Hall Conflict of Interest**: (1) Fred Jones Hall illegally holds two public offices (Urban Renewal and Turnpike Authority); (2) Fred Jones has a joint venture/partnership with the Hogans- the East-Wharf -Lake Hefner; (3) Fred Jones-Hall and the

Hogans have other business relationships including other real estate ventures in other parts of the City including in the Edmond area; (4) That four days after the Urban Renewal approved the TMK/Hogan Redevelopment Plan, the Hogans released a lien they had against Fred Jones; (5) Fred Jones Hall has another interest in awarding the Urban Renewal's Agreements to TMK/Hogan, especially the favorable Ground Lease terms because Fred Jones is a General Partner in OKC Athletic Club; (6) The Fred Jones entities, own numerous properties in the downtown area of Oklahoma City and the majority of these properties are located within the Urban Renewal Projects District; (7) Several properties owned by Fred Jones in the downtown area, not only are part of an Urban Renewal Project, but were sold to Fred Jones by the Urban Renewal (for a minimal consideration); (8) Fred Jones companies not only did not develop all the properties it purchased from Urban Renewal for a "redevelopment" purpose, but they sold one of these properties to the Art Council of Oklahoma City (which is mainly "subsidized" with Taxpayers money). i.e., Fred Jones sold (for profit) to the community what the community gave him for almost free. This shows how "poor" the Authority's redevelopment agreements are as far as "safeguards" are concerned.

III. **J. Larry Nichols Conflict of Interest** : (1) in addition to being a commissioner of the Urban Renewal, Nichols is the president and majority owner of Devon Energy Corporation and controls DBC Inc. which owns the Mid America Tower building - adjacent to the new Renaissance Hotel. This property is in an Urban Renewal Project District, thus, Nichols is in violation of Title 11 O.S. § 38-118; (2) TMK/Hogan and Nichols have a business relationship in that TMK/Hogan is under contract with Devon/DBC/Nichols

as the exclusive leasing agent and/or manager of the Mid-America Tower building; (3) Despite his business relationship with TMK/Hogan, Nichols, not only voted for selecting TMK/Hogan as the "Chosen-Best" developer for the south Reno project, but he vigorously promoted the TMK/Hogan agreements.

IV. **James R. Tolbert, III Conflict of Interest**: (1) Tolbert is an Urban Renewal Commissioner and also holds a second official office as Chairman of the Myriad Gardens Authority, in violation of Title 51 O.S. § 6; (2) Tolbert has a personal interest in the Urban Renewal-TMK/Hogan Agreements because he is one of the Bricktown property owners in partnership with TMK/Hogan in the Parking Agreements; (3) Tolbert has personal interests in numerous properties in Bricktown - a clear violation Title 11 O.S. § 38-118; (4). Despite his business relationship with TMK/Hogan he vigorously promoted the TMK/Hogan Redevelopment Agreement.

V. **Former Mayor Ron Norick, Conflict of Interest**: (1) Norick has a business relationship with Fred Jones by way of receiving hundreds of thousands of dollars from Fred Jones in sponsorship of Norick and his son's race car; (2) While he was mayor, Norick approved the sale of numerous parcels of land in the downtown area - through the Urban Renewal to Fred Jones Hall and his entities for a fraction of the true value; (3) Norick, while mayor, also promoted and approved giving the Fred Jones and Randy Hogan the City owned land at Lake Hefner (the East Wharf Project). This was also "given" for a fraction of the true value; (4) Norick also had a business relationship with the Gaylords who own the majority interest in OKC Athletic Club. Norick knew that Fred Jones is also a General Partner in OKC Athletic Club. (5) Norick took part in the negotiation and finalization of the Parking

Agreements between the Urban Renewal and TMK/Hogan, OKC Athletic Club and the Bricktown property owners; (6) Norick, while Mayor, appointed Fred Jones Hall as Commissioner of the Urban Renewal. He also appointed Jim Tolbert as Chairman of the Myriad Gardens Authority; (7) Norick, as Mayor, acting in concert with others, was the "leader" in misleading the Council and the MAPS Board to believe that the Parking Agreements were "temporary", when in fact he knew these Agreements were for a minimum of 10 years and could be extended to 30 years. Norick acted in concert with others in "by-passing" the MAPS Ordinance and MAPS procedures by not submitting the Parking Agreement to the MAPS Board or City Council; (8) Norick also had conflict of interest in regards to the Power Plant and in switching the utilities services from Trigen to OG&E. OG&E has provided Norick with gifts, services and "favors" valued in the tens of thousands dollars.

36. T.A.R.'s right to a full and fair hearing was violated by the City's total failure to investigate, prosecute and introduce evidence on T.A.R.'s claims and its opposition to T.A.R.'s intervention in the Declaratory Judgment.

37. The evidence shows that the City's interest in affirming the Agreements conflicted sharply with the Taxpayers' interest in proceeding against and recovering from those who illegally mishandled Taxpayers' money and the City's property.

38. It should be noted that in the *Tal I* opinion, the Oklahoma Supreme Court stated that: *There is but a single, narrow issue in this case: Did the trial court err in denying T.A.R.'s motion to intervene and for continuance. City of Oklahoma City v. Oklahoma City Urban Renewal Authority,,* 988 P.2d 901, 905 (Okla. 1999) The Court

went on to hold that:

> *Because we conclude that Moshe Tal's petition for intervention was correctly denied, he stands excluded as a party litigant below and has no standing to tender for our review any errors made by the trial court.*

Id. at 906.

39. In their various Motions to Dismiss the defendants have all claimed that the Supreme Court affirmed the trial court's decision that the Agreements were valid and that the City complied with the MAPS Ordinance and procedures. The defendant's reliance is misplaced. The Supreme Court made the limited scope of its opinion quite clear. It was not ruling on the merits of the case. It was merely ruling on the propriety of denying T.A.R.'s motion to intervene and for continuance. Furthermore, the Supreme Court's holding that the Taxpayers did not have right to intervene in the Declaratory Judgment pursuant to Rule 2024, based on the limited facts and evidence contained in the record before the Court, is not co-extensive with a finding that the TAR is precluded from bringing a Qui Tam following the resolution of the declaratory judgment. In fact, the Supreme Court made it quite clear that its decision was based on the ***absence of evidence in the record*** that Oklahoma City acted in bad faith or that the suit was collusive or fictitious. The Court also made it clear that evidence of bad faith, collusion or other wrongdoing on the part of the City would support a finding that the City did not adequately represent the Taxpayer interests.

40. Because of the City's efforts to keep the Taxpayers out of the Declaratory Judgment action, this action is the first opportunity the Taxpayers have had to

demonstrate how the City effectively prevented the Taxpayers from getting facts and testimony in evidence to show that the suit was collusive and that they were prevented from introducing evidence to show that the City's and the taxpayer's interests conflicted, that the City failed to use reasonable diligence in pursuing their claims and because of this, the City's representation was inadequate as a matter of law.

PROPOSITION I

MOTIONS FOR SUMMARY JUDGMENT MUST BE DENIED WHERE THERE ARE GENUINE ISSUES OF MATERIAL FACT.

While defendants denominate their pleadings as Motions to Dismiss, 12 O.S. § 2012(B) explicitly states a motion to dismiss which references outside material will be treated as a motion for summary judgment. *See Rooks v. State Through Oklahoma Corp. Com'n,* 842 P.2d 773, 776 (Okla.App. Div. 3 1992).

Summary judgments are not favored. A motion for summary judgment may be granted only when the pleadings, affidavits, depositions, admissions and other evidentiary materials establish that there is no genuine issue of any material fact, and that the moving party is entitled to judgment as a matter of law. In deciding a motion for summary judgment, all conclusions drawn from evidentiary materials must be viewed in the light most favorable to the party opposing the motion. Even when basic facts are undisputed, motions for summary judgment should be denied if, under the evidence, reasonable persons might reach different inferences or conclusions from the undisputed facts. *Bird v. Coleman*, 939 P.2d 1123, 1127 (Okla. 1997).

Inquiry into the preclusive effect of representative actions is a fact intensive inquiry. *Gonzalez v. Banco Cent. Corp.*, 27 F.3d 751, 761 (1st Cir. 1994). The factual nature of this inquiry should make such a decision a question for the trier of

fact and inappropriate for summary judgment.

The facts relating to res judicata in this case are highly disputed and to the extent the facts are not disputed, reasonable persons might draw different inferences or reach different conclusions from the undisputed facts. T.A.R. therefore asks the Court to deny the Defendants' Motions to Dismiss.

PROPOSITION II

DUE PROCESS REQUIRES THAT THE TAXPAYERS HAVE A FULL AND FAIR HEARING ON THEIR CLAIMS.

Due process, the right to a full and fair hearing, is the fundamental right underlying Taxpayers right to bring a qui tam action to prosecute fraud against the government in situations where the government fails, refuses or neglects to bring a proper action. Similarly, due process governs whether a judgment in a representative action, such as a qui tam, is res judicata as to non-parties. *Richards v. Jefferson Cty,* 116 S.Ct. 1761, 1768-69, 517 U.S. 793, 802-04, 135 L.Ed.2d 75.

A nonparty's right to due process is violated in a representative or derivative action when the representative party in the litigation has interests that conflict with the nonparty members of the representative class. In *Hansberry v. Lee*, 311 U.S. 32, 37, 61 S.Ct. 115, 85 L.Ed. 22 (1940), the United States Supreme Court held that the lower court violated the plaintiffs' Fourteenth Amendment right to Due Process when it attempted to bind litigants to a judgment rendered in an earlier representative action to which they were not parties and in which there was a conflict of interest between the representative party and the members of the class. *Richards v. Jefferson County Alabama*, 517 U.S. 793, 116 S.Ct. 1761, 135 L.Ed. 76 (1996).

To preclude a party from litigating an issue decided in a prior action, due process requires that the party have had a full and fair opportunity to litigate the claim or issue. *Kremer v.*

Chemical Construction Corporation, 456 U.S. 461, 480-81, nt. 22, 102 S.Ct. 1883, 1897, nt. 22, 72 L.Ed.2d 262 (1982); *Sil-Flo, Inc. v. SFHC, Incorporated*, 917 F.2d 1507 (10th Cir.1990). *See also Temeron, Inc. v. Ferraro Energy Corporation*, 861 P.2d 319 (Okla.App.1993). Often the court's determination regarding whether a party had a full and fair opportunity to litigate will include inquiry into:

1) whether there were significant procedural limitations in the prior proceeding,

2) whether the party had the incentive to fully litigate the issue, and

3) whether the effective litigation was limited by the nature or relationship of the parties.

Dorchester Hugoton, Ltd. v. Dorchester Master Ltd. Partnership, 925 P.2d 1213, 1222. (Okla.App. Div. 3 1996). (*quoting* Sil-Flo, Inc., 917 F.2d at 1521).

T.A.R. will show the Court that there were significant procedural limitations in the Declaratory Judgment action, that the City did not have the incentive to fully litigate the issues and that effective litigation was limited by the relationship of the parties.

PROPOSITION III

RES JUDICATA DOES NOT PREVENT TAR FROM BRINGING THE PRESENT ACTION.

Res judicata, or claim preclusion, bars relitigation by the parties or their privies of issues which were or could have been litigated in an action which resulted in a final judgment on the merits. *Temeron, Inc. v. Ferraro Energy Corp.*, 861 P.2d 319, 323 (Okla.App. Div. 3 1993) (*citing Erwin v. Frazier*, 786 P.2d 61, 64 (Okla.1989).

When applying the doctrine of res judicata it is important to remember that in our system of law, there is a 'deep-rooted

historic tradition that everyone should have his own day in court.' 18 C. Wright, A. Miller, & E. Cooper, *Federal Practice and Procedure* § 4449, p. 417 (1981); *Martin v. Wilks*, 490 U.S. 755, 761-762, 109 S.Ct. 2180, 2184, 104 L.Ed.2d 835 (1989). Generally, one is not bound by a judgment in litigation in which he is not designated as a party or to which he has not been made a party by service of process. *Hansberry v. Lee*, 311 U.S. 32, 40, 61 S.Ct. 115 [117], 85 L.Ed. 22 (1940).

A. Exception in Certain Representative and Derivative Actions.

In certain limited circumstances, when a person, although not a party, has his interests adequately represented by someone with the same interests who is a party, he may be bound by the judgment in that action. *See Hansberry v. Lee*, 311 U.S. 32, 41-42, 61 S.Ct. 115, 117-118 (1940) (class or representative suits). To bind a non-party to the judgment in the prior case the party seeking preclusion must show: 1) adequacy of representation which is interpreted as incentive to litigate; 2) identity of interests between the two parties; 3) a close relationship between the prior and present parties; 4) participation in the prior litigation; 5) apparent acquiescence; and 6) whether the present party deliberately maneuvered to avoid the effects of the first action. *Louisana Seafood Management v. Foster*, 53 F.Supp.2d 872, 878 (E.D. Louisana 1999).

The courts should tread gingerly in applying res judicata to nonparties, as it is murky corner of the law. *Gonzalo v. Banco Central Corp.*, 27 F.3d 751, 757 (1st Cir. 1994) The perils of nonparty preclusion are real. Prominent among them is the prospect that an overly expansive arrangement of the concept, or too free use of it, may endanger constitutional rights.

B. Conflict of Interest Equals Inadequate Representation of Rights.

A judgment in a representative action cannot be held as res

judicata against persons who were not parties to the earlier action if the putative representative did not adequately represent the non-parties' interests. Representation is inadequate **as a matter of law** where the putative representative has interests that conflict with the interests of the class. It is axiomatic that a representative plaintiff cannot maintain a class action when his interests are antagonistic to, or in conflict with, the interest of the persons he would seek to represent. *Albertson's, Inc. v. Amalgamated Sugar Co.*, 503 F.2d 459, 463 (10th Cir. 1974)(*citing, inter alia, Hansberry v. Lee*, 311 U.S. 32, 61 S.Ct. 115, 85 L.Ed. 22 (1940). The requirement of adequate representation must be stringently applied because members of the class will be bound by the decision of the court. *Id.*

The United States Supreme Court held in *Hansberry v. Lee* that when a representative party has conflicting interests with a non-party, the judgment obtained by the representative party is not binding on the non-party. The Court held that because of the conflict of interest, due process mandated that the parties in the second action would not be bound by the judgment in the first action.

The *Hansberry v. Lee* conflict of interest rule applies in derivative actions. Thus, a stockholder who institutes a derivative suit cannot adequately represent the class of stockholders where the stockholder "may have participated in the wrong complained of, or may have ratified the wrong complained of or acquiesced in it, or have had knowledge of the wrong and been guilty of laches." *Liken v. Schaffer*, 64 F.Supp. 432, 442 (Iowa 1946). In *Johnson v. American Gen. Ins. Co.*, some of the shareholder-directors brought a shareholder derivative action against the corporation. However, the shareholder-directors, as a result of their being directors, were also defendants against whom liability could be imposed. The court held that, as a matter of law, the shareholder-directors had a fatal conflict of interest which would prevent them from adequately representing the other

shareholders. *Johnson v. American Gen. Ins. Co.*, 296 F.Supp. 802, 812 (D.C.D.C. 1969).

C. The Conflicts of Interest between OKC and the Taxpayers Prevent the Judgment in the Declaratory Judgment Action from Precluding the Qui Tam.

Defendant Dan Brummitt best stated the insurmountable conflict of interest between the interests of the City and the Taxpayers' in his opening remarks to the court in the declaratory judgment. Brummitt announced that the City brought the declaratory judgment action to protect their clients, the City Council members, from being subject to personal liability in a lawsuit alleging that the agreements were illegal. Brummitt's additional proclamation. *we took the only action that we could take by bringing this action as a declaratory judgment, we're going to put the agreements in front of the court* made it clear that the City had no intention of investigating and prosecuting the Taxpayers' claims.

As Brummitt proclaimed, the City's interest was in protecting its officials from liability for their illegal actions and having the agreements declared valid. These interests were in direct conflict with Taxpayers' interest in having the City officials' conflicts of interest and illegal conduct investigated and having an action brought to have the agreements declared illegal and void as a result of the official conflicts and misconduct.[5]

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[5] Fraud of a party will undermine the conclusiveness of a judgment where the fraud is extrinsic and deprives the party of the opportunity to appear and present his case. 46 Am.Jur. Jur.2d *Judgments* § 601. T.A.R. feels strongly that the City's conduct in this action rises to the level of being collusive or fraudulent. However, there is sufficient evidence to show inadequacy of representation through conflicts of

The result of these conflicting interests? The City's representation of the Taxpayers' was woefully inadequate. The City did not have any incentive to pursue the Taxpayers claims. It wanted the agreements to remain in place and it did not want to pursue its officials and employees for their illegal conduct. As Brummitt stated, the only incentive it had to bring any action at all was to prevent the Taxpayers from bringing it on behalf of the City. Thus, the City carefully chose the issue, adequacy of consideration, to prevent any inquiry into the questions of illegal conduct and conflicts of interest. Apparently, the City hoped that if it ignored the Taxpayers' other allegations , the allegations and Taxpayers would go away. Based on the avalanche of virtually identical Motions to Dismiss on the grounds of res judicata and lack of standing to bring a qui tam, it is obvious that the City brought the Declaratory Judgment counting on the judgment being res judicata as to the issues of illegal conduct that **could have been brought** in the earlier action.

The conflict of interest and resulting inadequacy of representation between the City and the Taxpayers can also be seen if one considers that all of the City Defendants were intimately involved in negotiating and drafting the agreements and getting the agreements approved, executed and implemented. Several of them spent a great deal of time and energy convincing members of the City Council and MAPS Board to approve the Agreements.

This places the City Defendants are in the precise position

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interest and other conduct depriving T.A.R. of its right to due process. Thus, it is not necessary to prove fraud or collusion. If, however, this Court finds that to avoid res judicata, T.A.R. must provide authorities, evidence and arguments to support a showing of fraud or collusion, T.A.R. requests that it be given the opportunity to amend this response to include such authorities, evidence and arguments.

as were the shareholder-directors in *Johnson v. American Gen. Ins. Co.,* 296 F.Supp. 802, *supra*. A party who is a named or a potential defendant cannot adequately represent the interest of the plaintiff class. *Id.* Nor can someone who participated, ratified, acquiesced or knew about the wrongful conduct and did nothing about it, represent a class of persons opposed to the wrongdoers. *Liken v. Schaffer*, 64 F.Supp. 432, *supra.*

Defendant Jim Thompson was the City Manager who worked with other City officials, employees and attorneys to negotiate, draft, execute and implement the Agreements and Contracts. His involvement in the process puts him in the class of persons who would be liable if the Agreements were held to be illegal and void.

Attorneys West and Brummitt both wrote letters articulating reasons that the terms of the redevelopment agreement were illegal. Despite the fact that the illegalities were not remedied, both attorneys subsequently drafted resolutions recommending the redevelopment agreement be passed and finding that it was legal. West and Brummitt also opined that using property purchased with MAPS funds for private development would be illegal. They also stated that the MAPS property could not be sold for private development unless it was first declared a surplus. Despite these known illegalities, West and Brummitt assisted the City in transferring the MAPS property for private development and in selling the MAPS property even though it had not been declared a surplus. West's and Brummitt's participation and their ratification and acquiescence in the wrongs put their interests in direct conflict with the Taxpayers interests. West's and Brummitt's behavior put them in the class of persons that could be held liable for repayment to the City of triple the value of money and or property transferred, paid or lost under the illegal Agreements.

Then, of course, there is Humphreys' and Norick's interest in preventing disclosure of their direct, indirect, illegal conflicts of interest and their interest in avoiding liability for

any amounts the City may be entitled to recover as a result of the illegal Agreements and Contracts. These men's interests are obviously antagonistic to the Taxpayers' interest in having the Agreements and Contracts declared illegal and void because of Humphreys', Norick's and others conflicts of interest. Certainly, the interest of the Taxpayers in recovering triple the value of money or property transferred under these illegal contracts is antithetical to Humphreys' and Norick's interest in not being held liable for these potentially enormous sums.

The evidence of irreconciable conflicts of interest between the interests of the putative representative, the City, and the interests of the Taxpayers is overwhelming. In *Tal I*, the City's subterfuge in narrowing the issues and then rushing to trial before the Taxpayers could adequately object and present their case, successfully prevented this evidence from getting into the record. Throughout its opinion in *Tal I* the Supreme Court noted that there was no evidence in the record to show that the City's representation was inadequate. For the first time in this action, the Taxpayers are able to present this evidence to the district court and, if need be, the Supreme Court, so that they can see the overwhelming conflict of interests between the City and the Taxpayers that prevented the City from adequately representing the Taxpayers interests.

To hold that res judicata bars the Taxpayers from bringing this action is to deny due process. To hold otherwise is directly contrary to the express holdings of the United States Supreme Court. The Taxpayers have a constitutional right to a full and fair hearing on their claims and if this right is denied by this court, the Taxpayers will seek certiorari believe that it is an issue suitable for appeal to the United States Supreme Court.

PROPOSITION IV

TAXPAYERS HAVE STANDING TO BRING THIS QUI TAM ACTION BASED ON CITY'S FAILURE TO DILIGENTLY PROSECUTE THE ALLEGATIONS CONTAINED IN THE WRITTEN DEMAND.

Resident Taxpayers of a City may, in the name of the State of Oklahoma as plaintiff, bring a qui tam action under §§ 372 and 373 to recover City money or property that was paid or transferred illegally or without authority. Before bringing a Qui Tam, the Taxpayers must first demand in writing that the City officers institute proper proceedings to recover the money and property wrongfully transferred. If the City officials refuse, fail or neglect to institute **or diligently** prosecute **proper proceedings** at law or in equity to recover any money belonging to the City, then the Taxpayers may bring a qui tam to enforce the City's right. *State ex rel. Trimble v. City of Moore,* 818 P.2d 889, 894 (Okla. 1991); *see also, Brown v. City of Warr Acres*, 946 P.2d 1140, 1149 (Okla. 1997).

The failure of a City solicitor to use reasonable diligence in prosecuting a suit instituted by him upon the written demand of a taxpayer constitutes a failure to comply with the written demand. *Williams v. Wilmington*, 171 N.E.2d 757 (Ohio 1960); 74 AM. JUR.2d Taxpayers' Actions § 31 (fn 80). "The failure of a City solicitor to use reasonable diligence in prosecuting an injunction suit instituted by such solicitor at the written request of a taxpayer . . . constitutes a failure to comply with the written request of the taxpayer within the meaning of those sections, and authorizes such taxpayer to prosecute such suit in his own name on behalf of the municipality." *Williams v. Wilmington*, 171 N.E.2d at 762-63.

Where a City shows its intent to dispute or contest the allegations made in the Taxpayers' written demand, it can be presumed that the City has refused to pursue the Taxpayers demand. *Taxpayers League of Wayne County v. Wightman*, 28

N.W. 2d 575 (Neb. 1947).

When the government brings an action on the written demand, the judgment in that action **will not preclude a derivative action by the citizens**, where there is evidence of a conflict between the self-interest of the government officials and the interest of the citizens. *Consumers Union v. Consumer Product Safety Comm'n*, 590 F.2d 1209, 1217-1218 (C.A. 1980) *reversed on other grounds*, 100 S.Ct. 1194, 445 U.S. 375, 63 L.Ed.2d 245 (1980) (*emphasis added*).

"Of their nature false claims act matters are typically complex and document intensive, requiring considerable investigation." *State Qui Tam Enforcement: Some Practical Perspectives,* N98CFCB ABA-LGLED K-13, *ABA Center for Continuing Legal Education National Institute on the Civil False Claims Act and Qui Tam Enforcement*. When the government decides to bring an action based upon a written demand, diligent prosecution requires that the government investigate the allegations and develop the facts in a thorough and detailed fashion. *Id.*

The City failed, refused and neglected to bring a proper action to recover the illegally spent MAPS money and illegally transferred property. The evidence clearly shows that the City disputed the Taxpayers' claims. It brought the Declaratory Judgment solely for the purpose of avoiding the Taxpayers' claims. It is also obvious to the most casual observer that the interests of the City and Taxpayers' were locked in irreconcilable conflict. Furthermore, the City failed to conduct any investigation into the facts supporting or refuting the Taxpayers' claims.

The City's actions, interests and failure to act are sufficient to support a finding that the City refused, failed and neglected to bring a proper action to redress Taxpayers' claims. Thus, the Taxpayers have standing to bring this qui tam action.

PROPOSITION V

THIS ACTION WAS BROUGHT WITHIN SIX MONTHS AFTER THE CITY FAILED OR NEGLECTED TO BRING A PROPER ACTION TO ADDRESS THE TAXPAYERS WRITTEN DEMAND.

A qui tam action must be filed within six months of the City's "refusal, failure, or neglect of the proper officers to act upon the written demand." 12 O.S. § 374. In *Tal v. Norick*, No. 93,273. Supreme Court of Oklahoma, Oct. 26, 1999 the Oklahoma Supreme Court held that a qui tam action based on a previous T.A.R. written demand was premature until the conclusion of the appeal on the Declaratory Judgment action instituted by the City. Thus, because the qui tam would be premature prior to the conclusion of the appeal in *Tal I,* it is the date of the Supreme Court's mandate, at the conclusion of the appeal, from which the six month statute of limitations began to run.

The mandate of the appellate court is the concluding event of the appellate process. The appellate court's ruling is merely provisional until mandate issues. The mandate communicates and signifies the finality of a higher court's appellate disposition. *Cartwright v. Atlas Chemical Industries, Inc.,* 623 P.2d 606, 610 (Okla. 1981). Mandate is governed by Sup. Ct.R. 1.16 which provides that mandate shall be issued upon conclusion of the matter on appeal.

The last decision handed down by the Oklahoma Supreme Court in *Tal I* was the order denying T.A.R.'s motion for rehearing on September 30, 1999. *Tal I* was finally concluded on October 26, 1999 when the Supreme Court issued mandate.

The Declaratory Judgment action was not final until the Supreme Court issued mandate on October 26, 1999. T.A.R. brought this action on March 15, 2000. That was less than five months after *Tal I* was finally concluded on appeal. It was not

until the conclusion of the appeal that T.A.R. could bring its Qui Tam based on the City's failure to diligently prosecute the matters in the Written Demand.

PROPOSITION VI

THE TAXPAYERS PROPERLY ASKED THE COURT TO EXERCISE ITS POWER TO INSTRUCT THE CITY TO HAVE THE APPROPRIATE AUTHORITIES INITIATE PROCEEDINGS TO INVESTIGATE CERTAIN OFFICIALS CONFLICTS OF INTEREST, CONDUCT AND IF NECESSARY REMOVE THEM FROM OFFICE.

T.A.R.'s Written Demand and Petition allege that the City officials violated various statutes and sections of the City charter that prohibit officers from having conflicts of interest, from holding dual offices and hold them liable for neglecting their duties. In some instances, violation of these laws renders the contracts void. Violation of these laws is also grounds for forfeiture or removal from office. Specifically these laws provide:

Under City Charter, Article II section 8. When the Mayor or any City Council members have a financial interest in any expenditure of the City "shall disqualify him and he shall forfeit his office."

Under City Charter, Article IV Section 11. Officers and employees of the City are prohibited from having any interest, direct or indirect, in any contract with the City. Violation of Section 11 "shall be deemed a cause for the removal from office or employment of such officer or employee."

Under City Charter, Article IV Section 7. A City Official cannot hold two offices, of whatever kind or nature.

51 O.S. § 6 also prohibits dual public office holding. Section 6's prohibitions have been interpreted by the Oklahoma Attorney General as barring a person from holding office as a commissioner of a municipal urban renewal authority and as

a trustee of public trust. Op.Atty.Gen. No. 82-35 (March 23, 1982). Similarly, a person is prohibited from being a member of the turnpike authority while holding the position of a regional hospital trustee. Op. Atty Gen. No. 85-58 (May 13, 1985).

Extant Oklahoma law holds that when a person takes a second office in violation of 51 O.S. § 6 he automatically forfeits the previously held office.

A. T.A.R. Has Not Asked the Court to Remove Any City Officials.

In its Petition, T.A.R. does not ask the court to remove any City officials. Rather, T.A.R. asks the Court to exercise its authority to issue mandamus and, upon a decision of the court or jury finding the defendant City Officials guilty of the charges, order the City, as a party to this action, to institute proceedings to investigate the cause for removal from office and determine whether or not to remove that person from office.

The discretionary power is vested in the governmental entity of determining when a suit shall be brought, but that means legal discretion. *Berry v. McLeod*, 492 S.E.2d 794, 801 (S.C. App. 1997). "Where it clearly appears that power is abused, the governing body places itself outside the protection of the rule stated, and may be compelled to act, or in some instances further remedies may be resorted to." *Id., (quoting Ex parte Hart,* 190 S.C. at 479, 2 S.E.2d at 54).

> If a county or other corporation has a plain cause of action for an injury done to it, that should be enforced for the protection of its members, and its governing body refuses to perform its plain duty in the premises, our system of jurisprudence is by no means so weak that justice can thereby be defeated. On the

> contrary, any member of the corporation, by reason of his indirect interest therein, suing in behalf of himself and all similarly situated, may set judicial proceedings in motion, making the corporation a defendant, as trustee for all of its members, and thereby enforce the rights of the corporation.

Berry v. McLeod, 492 S.E.2d 794, 801 (S.C. App. 1997) (citations).

Mandamus may be employed to remedy an offical's refusal to perform a plain legal duty resulting from an office, trust or station. *Aven v. Reeh*, 878 P.2d 1069, 1074 fn 5 (Okla. 1994).

The City has refused to perform its duty to investigate illegal conflicts of interest and misconduct and self dealing by its officials and employees and, if necessary, remove those people from office. It also has a duty to remove its officials who hold second public offices in violation of laws prohibiting dual office holding. The City has abused its discretion. The court may rightfully exercise its power of mandamus and compel the City to perform it's legal duty.

PROPOSITION VII

ALL PERSONS WHO HAD NOTICE OF THE FACTS THAT MADE THE CONTRACTS AND TRANSFERS ILLEGAL AND WHO EITHER MADE THE CONTRACTS OR BENEFITTED THEREFROM ARE NECESSARY AND PROPER PARTIES TO THIS ACTION.

Under 62 O.S. § 373 in a qui tam action, joint and several liability is imposed upon "every person having notice of facts (rendering the contracts or transactions with the City illegal) who either makes a contract with county or receives benefit involving improper payment of money or improper transfer of property."

In *State of Oklahoma ex rel. G.E. Hettel v. Security Natl Bank*

& Trust Company in Duncan, 922 P.2d 600 (Okla. 199), plaintiff brought a qui tam action challenging the legality of the county's issuance of bond in support of loans made by lead and participating banks to a business that eventually defaulted on the bond. The participating banks moved for summary judgment alleging that they could not be held liable for damages in the Qui Tam because there was no evidence that the banks had knowledge of the illegality of the bonds or the loans. The trial court granted summary judgment dismissing the action against the participating banks. The Oklahoma Supreme reversed, holding that it was reversible error to grant summary judgment. The Supreme Court held that in a qui tam action if there is evidence that a defendant has notice of the facts rendering the contract, payment of money or transfer of property illegal, that defendant is a proper party to the action and can be held liable for amounts recovered in the qui tam.

The City Defendants, Ronald J. Norick, Kirk D. Humphreys, James E. Thompson, William O. West and Daniel T. Brummitt, have argued that they cannot be held liable for any of the amounts recovered as a result of the illegal transfers and payments.[6] In a similar vein, several of the defendants OKC

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[6] The City Defendants complain that the Taxpayers cannot bring an action questioning the legality of the Power Plant Contracts because the decision to build the Power Plant was discretionary. This position totally misapprehends the nature of the action and the evidence supporting the claim. The Taxpayers claim the power plant agreement is illegal based on official misconduct and misconduct of OG&E. There is no question as to whether the Power Plant Contracts was a good or bad idea. The question is whether illegal means were used to obtain the Agreement and the building of the Power Plant. The illegality of the Agreement is patently evident from the $20 million judgment that Trigen obtained against OG&E for its illegal conduct in obtaining

Athletic Club, BAP Bricktown Parking, TMK Hogan Parking, the Hogan Group including TMK/Hogan, Hogan Property Management, L.L.C., Randy Hogan, contend that the Petition does not contain any specific allegations of wrongdoing against them. Furthermore, they claim that they cannot be held liable for the wrongdoing of a limited liability corporation of which they are a member. Defendants move from a false premise to an erroneous conclusion.

Everyone of these defendants, individually, had notice, if not actual knowledge, of the facts making these contracts and transfers illegal. As for the City Defendants, some of them will benefit directly from the illegal agreements. All of them acted in concert to make the contracts. There is no question that the Hogan Defendants made the contracts and will benefit from the illegal payment of money, the illegal agreements and the illegal transfers. Pursuant to Section 373 all of these defendants are potentially liable for the return of three times the money and/or value of property transferred pursuant to the illegal transactions.

The City Defendants and Hogan Defendants are not shielded from being named as parties in this action nor are they exempted from liability. They are all proper defendants based on their notice if not knowledge of the facts rendering the agreements illegal. Section 373 imposes joint and several liability on each individual based on their notice or knowledge and their connection and/or benefit from the illegal

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the Power Plant Contracts and getting the City to build the Power Plant. In addition to anti-trust violations, the Trigen jury also found that OG&E had bribed City officials. The City officials exercise of discretion in deciding whether to accept bribes, is not the type of discretion that cannot be questioned by the Taxpayers. The City Defendants' assertion that the legality of the Power Plant Contracts is immune from inquiry cannot withstand scrutiny.

agreements, transfers and payments. Each of these defendants are necessary and proper parties that are required to be joined to fully adjudicate this action.

CONCLUSION

The facts relating to res judicata in this case are far from undisputed. The evidence shows that there were irreconcilable conflicts between the interests of the City and the Taxpayers. Due process forbids the use of res judicata to bind the Taxpayers to a judgment obtained through representation by a party whose interests conflict with those of the taxpayers. The City failed to diligently prosecute the claims in the Written Demand and the Taxpayers are now entitled to bring their qui tam action.

For theses and other reasons stated above, Taxpayers respectfully request that the Defendants' Motions to Dismiss be denied.

Dated: April 20, 2000.

RESPECTFULLY SUBMITTED,

/S/ MaryGaye LeBoeuf
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[Certificate of Service, Appendix I-III, and Exhibits A-ZZ Omitted]